


San Francisco Law Library

No. 128547

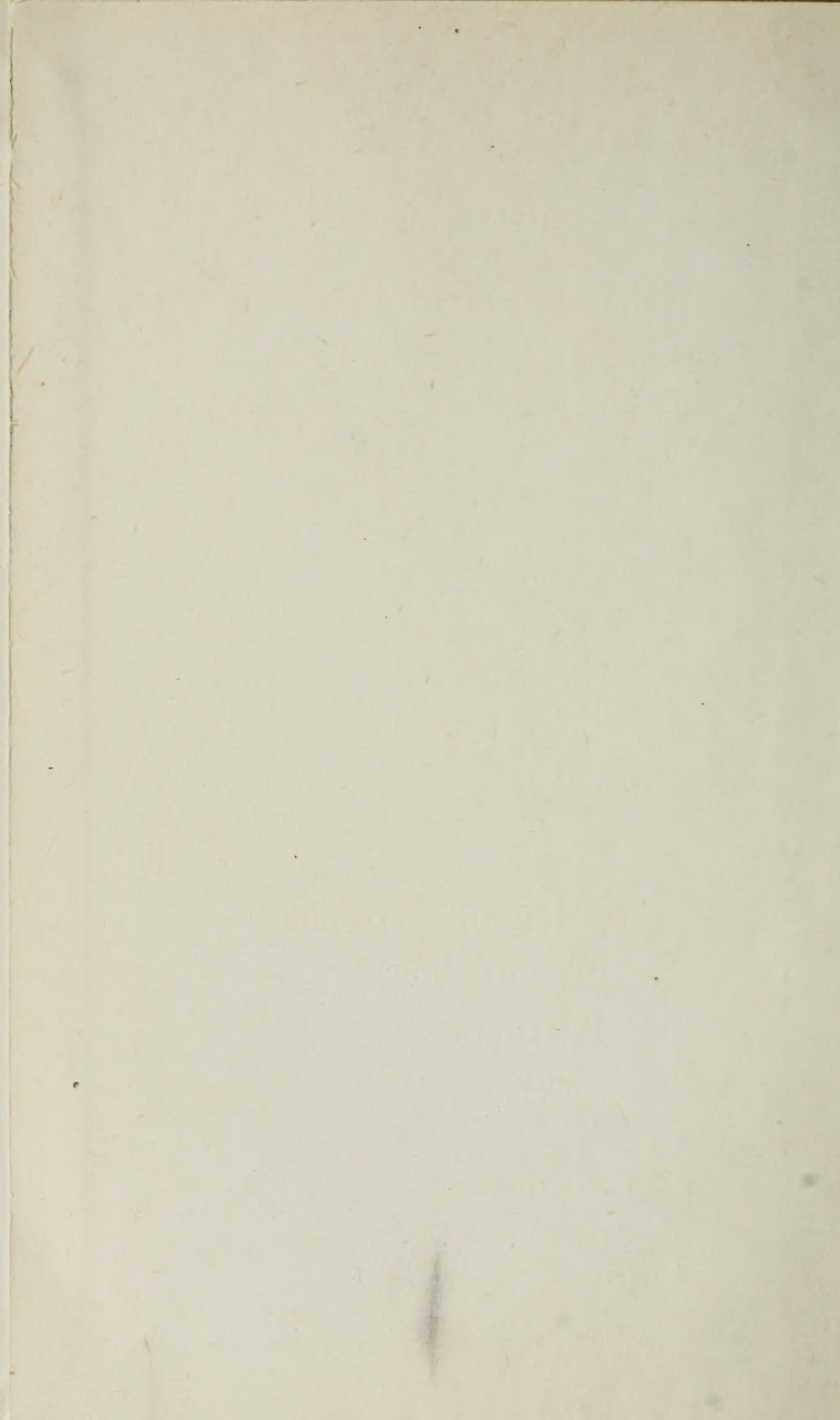
EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov



No. 11097

v. 2432

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

WALTER LUBINSKI,
Appellee.

WALTER LUBINSKI,
Appellant,
vs.

ALASKA STEAMSHIP CO., a Corporation,
Appellee.

Apostles on Appeal

In Two Volumes

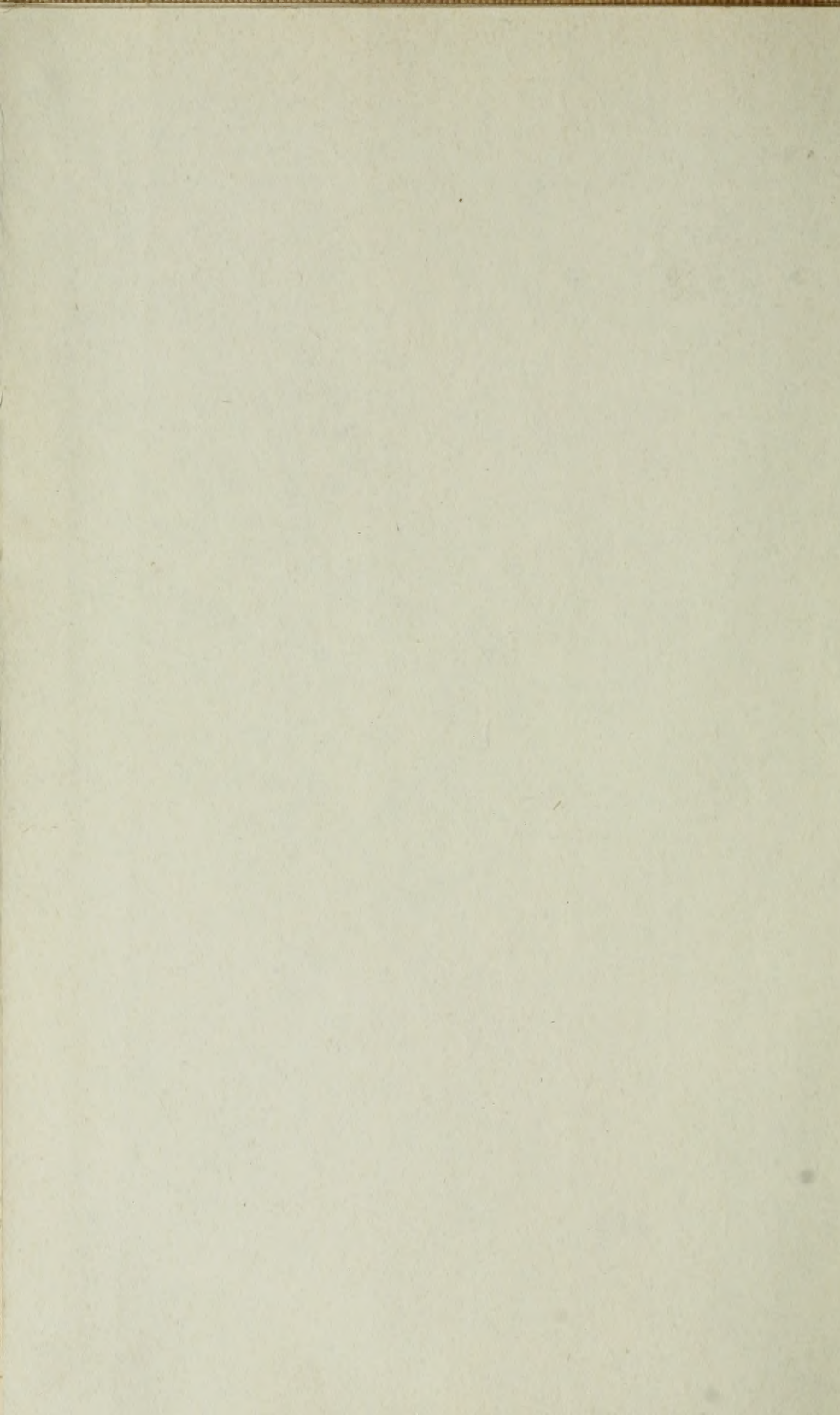
VOLUME I

Pages 1 to 270

Upon Appeals from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

OCT 16 1945



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of Respondents.....	6
Appeal:	
Certificate of Clerk to Apostles on.....	28
Citation on	27
Motion for Order Dispensing with Printing of Exhibits on.....	528
Order Allowing	22, 23
Order for Transfer of Exhibits on.....	25
Petition for Cross.....	23
Petition of Respondent for.....	19
Praeceptum for Apostles on.....	26
Statement of Points and Designation of Record on	526
Statement of Points and Designation of Record on (Cross-Appellant).....	530
Assignments of Error:	
Libellant's	24
Respondents	21
Certificate of Clerk to Apostles on Appeal...	28
Citation on Appeal.....	27

Index	Page
Decision dated March 2, 1945.....	8
Decree (Judgment)	18
Findings of Fact and Conclusions of Law....	13
Libel in Personam.....	2
Names and Addresses of Counsel.....	1
Motion for Order Dispensing with Reproduc- tion or Printing of Exhibits.....	528
Order Allowing Appeal.....	22, 23
Order for Transfer of Exhibits to USCCA...	25
Petition of Libelant for Cross Appeal.....	23
Petition of Respondent United States of America for Appeal.....	19
Praeceptum for Apostles on Appeal.....	26
Statement of Points and Designation of Rec- ord on Appeal Appellant's.....	526
Statement of Points and Designation of Cross- Appellant of Record on Appeal.....	530
Transcript of Testimony and Proceedings...	30
Exhibits for Libelant:	
1—Abstract from Clinical Record dated Mar. 15, 1944.....	86
3—"Regulations Governing Trans- portation of Military Explosives on board vessels during present emergency"	99

Index	Page
Exhibits for Respondents:	
A-1 —Signed statement of Walter C. Lubinski, dated Nov. 13, 1943.	155
A-2 —Certificate of Hospital and Outpatient Treatment, dated Jan. 14, 1944.....	159
A-3—General Agency Agreement, Excerpts	448
A-4 —Copy of Letter, Mar. 8, 1943, War Shipping Administration to Alaska Steamship Co.....	259
A-5 —Letter, Apr. 8, 1943, Chief of Allocation Assignments, San Francisco, to Alaska Steamship Co.	262
A-13—Application for Abstract from Clinical Record	478
A-14—Deposition of Dr. J. C. Schumacher	451
Witnesses for Libelant:	
Connolly, John	
—direct	143
—cross	145
Corvia, Peter (Deposition)	
—direct	190
—cross	202
—redirect	227, 232
—recross	231

Index	Page
Witnesses for Libelant (Cont.):	
Dorman, Dr. Purman	
—direct	113
—cross	127
—redirect	138
—recross	140
Gladis, Nicholas M.	
—direct	70
—cross	77
Huck, William	
—direct	141
—cross	143
Kenney, Robert T.	
—direct	335
—cross	348
—redirect	356
Lubinski, Walter	
—direct	48
—recalled, direct	78
—cross	103
—recalled, cross	145
—redirect	161
—recross	164
—rebuttal, direct	520
Uzdadinis, Steven (Deposition)	
—direct	167
—cross	176

Index	Page
Witnesses for Libelant—(Contd.)	
Zeigler, Paul (Deposition)	
—direct	498
—cross	504
—redirect	517
—recross	518
Witnesses for Respondents:	
Barkan, Dr. Otto (Deposition)	
—direct	395
Frick, Raymond L. (Deposition)	
—direct	385
—cross	389
—redirect	392
—recross	393
Goodwin, Charles N. (Deposition)	
—direct	233
—cross	243
—redirect	252
Killingsworth, V. W.	
—direct	254
—cross	264
Kristiensen, John (Deposition)	
—direct	271
—cross	295
—redirect	318

Index	Page
Witnesses for Respondent—(Contd.)	
Morrow, Dr. James R.	
—direct	404
—cross	423
—redirect	440
Schumacher, Dr. James (Deposition)	
—direct	451
—cross	470
—redirect	473, 485
—recross	475
Seather, Jorgen I. (Deposition)	
—direct	321, 358
—cross	370
—redirect	384
Tomlinson, M. W.	
—direct	442
—cross	445
—redirect	446

NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant and Cross-Appellee:

MR. J. CHARLES DENNIS,

United States Attorney

1017 U. S. Court House

Seattle, Washington

MESSRS. BOGLE, BOGLE & GATES, and

EDWARD S. FRANKLIN

603-24 Central Building

Seattle, Washington

Attorney for Appellee and Cross-Appellant:

MR. SAM L. LEVINSON,

1602 Northern Life Tower

Seattle, Washington [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States District Court, Western District of
Washington, Northern Division

In Admiralty, No. 14601

WALTER LUBINSKI,

Libelant,

vs.

ALASKA STEAMSHIP CO., a corporation,
and UNITED STATES OF AMERICA,
Respondents.

LIBEL IN PERSONAM

Action under special rule for seamen to sue without security or prepayment of fees, for the enforcement of the laws of the United States, common and statutory, for the protection of the health and safety of seamen at sea.

Comes now the libelant above named, and, for cause of action against the respondents, complains and alleges as follows:

I.

That now, and at all times hereinafter mentioned, the respondent Alaska Steamship Company was a corporation organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Seattle in the Western District of Washington, Northern Division. That the respondent United States of America was the owner of the SS "George Flavel," a merchant vessel of the United States, and through its agency,

the War Shipping Administration, operated the same jointly with respondent Alaska Steamship Company under some arrangement, the exact nature of which is unknown to libelant. That the libelant is a resident of the Western District of Washington, Northern Division.

II.

That the respondents employed libelant as a boatswain on said vessel on a voyage commencing at San Francisco, California, on the 23rd day of June, 1943, to Alaskan waters, and terminating at Seattle, Washington, on the 28th day of September, 1943.

III.

That on or about the 15th day of July, 1943, while said vessel was in navigable waters at Attu, Alaska, the respondent negligently permitted the stowage of certain smoke signal bombs in the forepeak of said vessel along with the gear of said vessel. That at about the hour of 10:00 o'clock P.M. on said day, a member of the crew of said vessel entered said forepeak for the purpose of obtaining gear, and while there negligently knocked over one of said smoke signal bombs, causing the same to ignite and emit a large quantity of smoke. That libelant was directed by the mate on said vessel to enter said forepeak for the purpose of assisting in extinguishing said fire, and that although he wore a gas mask, the smoke from said bomb permeated said mask and into his eyes. That shortly thereafter both of libelant's eyes became inflamed, and that immedi-

ately thereafter there was some loss of vision in libelant's left eye.

IV.

That on or about the 15th day of August, 1943, a fire occurred in No. 3 hold due to the negligence of the respondents in permitting combustible material to be in and about said hold during the unloading of motor vehicles. That it was necessary to attempt to put out said fire with the use of several hoses, which were lowered into the said hold, and gas masks were used by all of the crew engaged in fighting said fire, including libelant. That one of the members of said crew negligently directed a hose against libelant, striking him and causing the gas mask to be thrown from his face, and again subjecting him to the noxious fumes and smoke, causing further irritation to his eyes.

V.

That as a direct and proximate result of the negligence of the respondents as aforesaid, libelant received a severe [3] intraocular damage to the eyeball, resulting in a uveitis and the development of inflammatory adhesions between the iris and the lens; that he has suffered a complete and permanent loss of vision to the left eye, and that his right eye has been weakened. That there exists a potential focus of infection and damage to his right eye as the result of injury to his left eye. That at the time of receiving said injury, libelant was an able-bodied man of the age of 29 years, with a normal life ex-

pectancy of 36.03 years, capable of earning and actually earning the sum of \$500.00 per month as a seaman. That he left said vessel at the end of the voyage thereof on the 28th day of September, 1943, and was paid his wages to the end of the voyage; that from the 28th day of September, 1943, to the 29th day of February, 1944, libelant was totally incapacitated from following any gainful occupation; that his ability to follow any gainful occupation has been permanently impaired; that he has suffered intense pain in the past and will continue to suffer such pain in the future, to his total damage in the sum of \$25,000.00.

VI.

That on the 2nd day of March, 1944, libelant made a claim in writing upon the respondent United States of America, through its general agent, the Alaska Steamship Company, and that more than sixty days have fully elapsed since the filing of said claim, and the same has been neither accepted nor rejected, and has, therefore, been administratively disallowed.

Wherefore, libelant prays that he have and recover judgment against the respondents, and each of them, in the sum of Twenty-Five Thousand Dollars (\$25,000.00), and for his costs and disbursements in this action incurred.

SAM L. LEVINSON,

Proctor for Libelant.

[Endorsed]: Filed May 11, 1944. [4]

[Title of District Court and Cause.]

ANSWER OF RESPONDENTS

Come now the respondents above named, and in answer to the libel of libelant on file herein, admit, deny and allege as follows:

I.

Answering Article I, respondents admit the corporate allegation as pleaded concerning respondent Alaska Steamship Company. Respondents admit that respondent United States of America was the owner of the S.S. George Flavel, a merchant vessel of the United States, which was being operated at the times alleged in said libel by the War Shipping Administration. Respondents further admit that at said times respondent Alaska Steamship Company, a corporation, was acting as general service agent on behalf of the War Shipping Administration of the respondent United States of America in the servicing of said vessel.

Respondents deny that libelant is a resident of the Western District of Washington, Northern Division.

II.

Answering Article II, respondents admit that the libelant was employed as bo's'n by the respondent United States of America on the above mentioned vessel and during the times alleged in said article.

III.

Answering Articles III, IV and V of the libel, respondents deny each and every allegation therein

contained, and particularly deny that the libelant has been damaged in the sum therein alleged or in any other sum or sums whatsoever by reason of any fault, neglect or liability on the part of the respondents, or either of them.

IV.

Answering Article VI of the libel, respondents admit the same.

Further answering the libel and by way of first affirmative defense thereto, respondents allege:

I.

That if the libelant has been injured and/or damaged as in his libel alleged, or at all, said injuries and/or damages were solely and proximately caused and contributed to by libelant's own neglect and want of due care.

Wherefore, having fully answered the libel of libelant, respondents pray that the same may be dismissed and they recover their costs and disbursements herein to be taxed.

CHARLES F. DENNIS

U. S. District Attorney

G. D. HILE

Asst. U. S District Attorney

BOGLE, BOGLE & GATES

(Of counsel)

Proctors for respondent

U. S. A.

BOGLE, BOGLE & GATES
STANLEY B LONG
EDW. S. FRANKLIN

Proctors for Respondent Alaska
Steamship Company.

[Endorsed]: Filed May 19, 1944.

Copy received May 19, 1944.

SAM L. LEVINSON. [6]

[Title of District Court and Cause.]

COURT'S DECISION

March 2, 1945

The Court: This is a secret file, and what the Court says will not be published; and anyone who might have an interest to do so is directed not to publish or assist in publishing the decision of the Court in any kind of publication, without the further order of the Court.

I find it impossible to believe from the evidence that the libelant and his fellow crewmen believed they were employees of the Alaska Steamship Company.

It is all the more true with the libelant, in view of his leading activities in connection with Union affairs. A man as intelligent and well-informed as the libelant is would not remain uninformed about the true state and relationship of the Alaska Steamship Company under the General Agency Agreement.

I find that the libelant and his fellow crewmen were not employees of the Alaska Steamship Company, but that they were employees of only the War Shipping Administration, which in this case is the alter ego of the United States of America.

With the exception of the allegation as to the amount of damages sustained by the libelant, the Court finds and concludes that a preponderance of the evidence introduced in this case supports the allegations of the libelant's libel, so far as concerns the United States of America, as set forth in Paragraphs I, II, III, IV, V and VI of the libel.

I think it is clearly established that there was negligent stowage of this smoke bomb. By direction of an officer of the ship the smoke bombs including the one in question were removed from the deck and stowed in the [8] forepeak among the ship's stores. Whether there were any regulations determining the method and location of stowage or not, it was well known to those employed on the ship that smoke bombs should be left out on deck, where escaping gases would not be confined to produce discomfort and danger to persons, and where they would be mere accessible for immediate and emergency use.

It seems obvious to the Court from the testimony in the case that to stow smoke bombs, as these were, in the forepeak, where the containers might be disturbed by persons rightfully using the space in the course of their duties and allow smoke and gas to escape from the containers and remain confined in the forepeak space, created a danger which might

foreseeably result in harm to some person rightfully going into the forepeak space.

The mere fact that some persons, other than the libelant, used this space without injury while the gas was escaping from this smoke bomb, does not in the Court's mind disprove the contention of libelant that he was injured by the smoke and gas which may have been produced by it. Some men assume certain risks without any deleterious after effects; but others exposed to the same dangers may suffer deleterious effects from the experience. The Court is convinced by the evidence that libelant's eyes were injured at Attu by the smoke and gas from the smoke bomb negligently stowed in the forepeak of the vessel.

Likewise I think the libelant has made out a case of negligence so far as the occurrences at Kiska are concerned. I think the standard of ordinary care is sufficient to require a fellow crewman to so manipulate a water hose [9] as not to knock from the face or out of position on the face of his fellow employee a gas mask under the circumstances involved at Kiska. I find that the libelant received such blows from that hose water, and such injuries from those gases and smoke that were there present, as to aggravate the condition resulting from his injuries at Attu a month earlier.

The question of the extent of the injuries and as to whether or not the smoke injury to the libelant's eyes caused the loss of his left eye is perhaps a harder question from the standpoint of the evidence in the case than the question of whether or not the

United States was negligent, and whether or not such negligence proximately caused some injury to libelant.

The greater amount of the medical testimony, as measured by the greater number of witnesses, was to the effect that the kind of eye affliction and damage experienced by libelant could not have been caused by this smoke damage to the eye and that libelant's kind of eye trouble is usually caused by systemic infection; but that medical testimony, which was so positively to the effect that the injury sustained by libelant on board this ship did not cause the damage experienced by the libelant, is less convincing because of the fact that that same medical testimony offered no positive proof of the presence of a systemic cause or any cause different from that asserted by libelant. There was some medical testimony supporting libelant's contention that the smoke bomb injury aggravated by injuries from hose water and smoke at Kiska caused his eye trouble.

It seems to me that, with the aid of modern medical tests, it could have been ascertained certainly whether [10] or not the libelant had any infection in his system; but there was no proof of that at all.

The testimony of Dr. Morrow, who testified in Court, carried great weight; but it failed of that convincing power necessary to a conclusion in favor of the theory of systemic infection which his testimony supported, in view of the fact that Dr. Morrow did not state for a certainty, nor did any other witness state, that there was any systemic infection

to cause the loss of sight in one of libelant's eyes, and because the Court believes from a consideration of all the testimony, lay testimony as well as expert medical testimony, that the injury to libelant's eye was caused by this smoke and attendant gas injury. There isn't anything in the record which certainly proves to the contrary, and the preponderance of the evidence in the record convinces the Court that the cause alleged was the cause of libelant's eye injury.

A further question is to be determined, and that is, what was the extent of libelant's damages? He was getting well paid for his work, and it is possible that he may not have the same opportunity of employment in the deck department in the future that he might have had without this injury to his eye. I am inclined to think that that is reasonably established by the evidence, and I think thereby his future earning capacity will be depreciated.

But I do not believe that the evidence tends to prove, and libelant does not contend, that he will be wholly disabled from carrying on any gainful occupation. It is possible he may be able to find employment in the engine department or other departments of ships that may not require the use of the most efficient eyesight as a prerequisite to [11] employment.

Considering his earning capacity, the extent of his injuries, his life expectancy, and all of the evidence in this case, the Court finds and concludes that the libelant has been damaged in the sum of \$17,500.00, and that he should recover that sum from the re-

spondent United States of America; that the libelant take nothing in this action against the respondent Alaska Steamship Company, and that the libel as to that respondent be dismissed.

Mr. Franklin: Is your Honor going to make any finding on contributory negligence?

The Court: I find that libelant was not guilty of contributory negligence.

(Discussion between Court and Counsel as to a date for settling findings.)

The Court: This matter is continued until a week from this coming Monday, the 12th of March, for settling findings of fact, conclusions of law and decree.

[Endorsed]: Filed Mar. 7, 1945.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing before the Honorable John C. Bowen, one of the Judges of the United States District Court for the Western District of Washington, Northern Division, on the 9th day of January, 1945, at Seattle, Washington, the libelant appearing in person and being represented by his proctor, Sam L. Levinson, and the respondents appearing by their proctors, Messrs. Bogle, Bogle & Gates, Stanley B. Long and Edw. S. Franklin; and the libelant having thereupon intro-

duced his testimony and rested, and the respondents having thereupon introduced their testimony and rested; and the court having continued the matter for argument to the 2nd day of March, 1945; and the respective proctors having filed briefs and memorandums of authorities, and having been heard on the 2nd day of March, 1945; and the Court having duly considered the matter, and having announced its decision, and being fully advised in the premises, now enters the following

FINDINGS OF FACT

I.

That the respondent Alaska Steamship Co., a Corporation, with its principal place of business at Seattle, Washington, in the Western District of Washington, Northern Division, was acting under a general agency agreement in the operation of the SS "George Flavel," a United States vessel, and as such general agent made available to the United States members of the crew of said vessel, [13] and did not employ libelant as a seaman on said vessel.

II.

That the respondent United States of America, through its agency the War Shipping Administration, employed the libelant as a boatswain on said vessel on a voyage commencing at San Francisco, California, on the 23rd day of June, 1943, to Alaskan waters, and terminating at Seattle, Washington, on the 28th day of September, 1943.

III.

That sometime prior to the 15th day of July, 1943, while said vessel was in navigable waters at Attu, Alaska, the officers of said vessel negligently permitted and directed the stowage of certain smoke signal bombs in the forepeak of said vessel, along with the gear of said vessel. That on the 14th day of July, 1943, a member of the crew of said vessel entered said forepeak for the purpose of obtaining gear and while there, knocked over or kicked one of said smoke signal bombs, causing the escapement of a large quantity of gas, smoke and fumes. That libelant, in the course of his employment, entered said forepeak for the purpose of assisting in extinguishing said gas, smoke and fumes therefrom, and that the gas, smoke and fumes therefrom permeated libelant's gas mask and irritated and injured his eyes. That shortly thereafter libelant's eyes became inflamed, and resulted in a loss of vision in his left eye.

IV.

That on or about the 15th day of August, 1943, a fire occurred in No. 3 hold of said vessel, and that in the course of his employment, the libelant entered into said hold wearing a gas mask. That the members of the crew, in fighting said fire, negligently directed a hose against said libelant, striking him in the face and causing the gas mask to be thrown from his face, subjecting him to fumes, smoke and water, and aggravating a pre-existing condition; and that libelant was not contributorily negligent. [14]

V.

That as a direct and proximate result of the negligence of respondent United States of America as aforesaid, libelant received a severe intraocular injury to the eyeball, resulting in a uveitis and an inflammatory condition between the iris and the lens, and that he has suffered a complete and permanent loss of vision to the left eye, and that there exists a potential danger to his right eye as a result of the injury to his left eye; that at the time of receiving said injury libelant was an able-bodied man, with good eyesight, of the age of 29 years, with a normal life expectancy of 36.03 years, and earning approximately \$500.00 per month as a seaman; that he was paid his wages to the end of the voyage of said vessel on the 28th day of September, 1943, and from said date to the 29th day of February, 1944, he was totally incapacitated from following any gainful occupation, and that his earning capacity has been permanently impaired; that he has suffered pain in the past, and now suffers pain on occasions from said eye; that he suffers humiliation and embarrassment by reason of the loss of sight in said eye and the necessity of wearing a covering on said eye; and that his total damage is the sum of \$17,500.00.

Done in open court this 12th day of March, 1945.

JOHN C. BOWEN

Judge

From the foregoing Findings of Fact, the court now enters its following

CONCLUSIONS OF LAW

I.

That as to the respondent Alaska Steamship Co., a corporation, the libel is personam should be dismissed with prejudice, [15] with taxable costs to said respondent.

II.

That libelant recover a judgment against the respondent United States of America in the sum of \$17,500.00, and his costs to be taxed.

To the foregoing Findings of Fact and Conclusions of Law, the libelant, United States of America, excepts, and its exception is hereby allowed.

Done in open court this 12th day of March, 1945.

JOHN C. BOWEN

Judge

Approved: As to Form.

BOGLE, BOGLE & GATES

Proctors for Respondents.

Presented by:

SAM L. LEVINSON

Proctor for Libelant.

[Endorsed]: Filed Mar. 12, 1945.

United States District Court, Western District of
Washington, Northern Division

In Admiralty—No. 14601

WALTER LUBINSKI,

Libelant,

vs.

ALASKA STEAMSHIP CO., a corporation; and
UNITED STATES OF AMERICA,
Respondents.

DECREE.

This Matter having come on before the Honorable John C. Bowen, one of the Judges of the United States District Court for the Western District of Washington, Northern Division, on the 9th day of January, 1945, and being thereafter continued to the 2nd day of March, 1945; libelant appearing in person and by his proctor Sam I. Levinson; and respondents appearing by their proctors, Messrs. Bogle, Bogle & Gates, Stanley B. Long and Edw. S. Franklin; and the court having heretofore entered its Findings of Fact and Conclusions of Law; now, therefore,

It is hereby Ordered, Adjudged and Decreed that the libel in personam be dismissed with prejudice against the respondent Alaska Steamship Co., a corporation, with taxable costs to said respondent.

It is further Ordered, Adjudged and Decreed that libelant have and recover judgment against

the respondent, United States of America, in the sum of Seventeen Thousand, Five Hundred Dollars (\$17,500.00), and his costs and disbursements herein to be taxed.

To all the foregoing the respondent, United States of America, excepts, and its exception is allowed.

Done in Open Court this 12th day of March, 1945.

JOHN C. BOWEN

Judge.

Approved as to form:

BOGLE, BOGLE & GATES

Proctors for respondents.

Presented by:

SAM L. LEVINSON

Proctor for Libelant.

[Endorsed]: Filed Mar. 12, 1945. [17]

[Title of District Court and Cause.]

PETITION OF RESPONDENT UNITED
STATES OF AMERICA FOR APPEAL

The above named respondent, United States of America, being aggrieved by the decree rendered and entered in the above entitled action on the 12th of March, 1945, in favor of libelant and against respondent, United States of America, for the reason specified in the assignment of errors filed

herein, desires to appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit.

Wherefore, the respondent prays that said appeal may be allowed and that said appeal may be made returnable to the United States Circuit Court of Appeals for the Ninth Circuit according to law, and that a transcript of the records, proceedings, papers, and exhibits upon which said judgment was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in San Francisco in the State of California.

Dated this 2nd day of June, 1945.

J. CHARLES DENNIS

United States District Attorney

By BOGLE, BOGLE & GATES

Proctors for Respondent

United States of America

BOGLE, BOGLE & GATES

STANLEY B. LONG

EDW. S. FRANKLIN

(of Counsel)

Copy Received Jun. 2, 1945.

SAM L. LEVINSON

[Endorsed]: Filed June 2, 1945. [18]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now United States of America, respondent in the above entitled action, having appealed from the final decree entered in the above entitled action on the 12th day of March, 1945, in support of said appeal, makes the following assignments of error:

I.

The Court erred in making finding of fact III for the reason that said finding is not sustained by the weight of the evidence and is clearly erroneous.

II.

The Court erred in making finding of fact IV for the reason that said finding is not sustained by the weight of the evidence and is clearly erroneous.

III.

The Court erred in making finding of fact V for the reason that said finding is contrary to the weight of the evidence and is clearly erroneous.

IV.

The Court erred in rendering the final decree which was entered herein on March 12, 1945, adjudging that the [19] libelant was entitled to recover from respondent, United States of America, the sum of Seventeen Thousand Five Hundred Dollars (\$17,500.00) and his costs and disbursements in said action, for the reason that this portion

of said decree is not supported by the weight of the evidence and is clearly erroneous.

J. CHARLES DENNIS

United States District Attorney

By BOGLE, BOGLE & GATES

STANLEY B. LONG

EDW. S. FRANKLIN

(of counsel) proctors for respondent United States of America.

[Endorsed]: Filed June 2, 1945. [20]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

This cause coming on for hearing upon the petition of respondent, United States of Amreica, for allowance of appeal in the above entitled action to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree in this action entered on the 12th day of March, 1945, and said petition for allowance of appeal having been presented to the Court.

Now, Therefore, said petition is hereby granted and said appeal is allowed.

Done in open Court this 2nd day of June, 1945.

JOHN C. BOWEN

United States District Judge

Presented by:

EDW. S. FRANKLIN

Of proctors for respondent.

Copy received June 2, 1945.

SAM L. LEVINSON

[Endorsed]: Filed June 2, 1945. [21]

[Title of District Court and Cause.]

LIBELANT'S PETITION FOR CROSS
APPEAL.

Libelant, being aggrieved by that portion of the rulings and findings of the United States District Court wherein the respondent Alaska Steamship Company is dismissed with prejudice herein, claims a cross-appeal from that portion of said decree and the rulings and findings in support thereof, and prays that his said appeal may be allowed.

WALTER LUBINSKI

Libelant

By SAM L. LEVINSON

His proctor

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

Done in Open Court this 18th day of June, 1945.

JOHN C. BOWEN

Judge.

Service acknowledged this 18th day of June, 1945.

J. CHARLES DENNIS

U. S. Dist. Atty.

By BOGLE, BOGLE & GATES
of Counsel

Presented by:

SAM L. LEVINSON

Proctor for Libelant

[Endorsed]: Filed June 18, 1945. [22]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The libelant, Walter Lubinski, hereby assigns as error on his cross-appeal in the Findings, Decree and Decision of the District Court in the above entitled action as follows:

(1) The District Court erred in entering that portion of Finding of Fact I wherein it states that the respondent, Alaska Steamship Company, did not employ libelant as a seaman on the SS "George Flavel", for the reason that said finding is not sustained by the evidence.

(2) The District Court erred in entering that portion of the decree wherein it is provided that the libel be dismissed with prejudice against the respondent Alaska Steamship Company.

WALTER LUBINSKI

Libelant

By SAM L. LEVINSON

Proctor for Libelant

Service acknowledged June 18, 1945.

J. CHAS. DENNIS

U. S. Dist. Attorney

BOGLE, BOGLE & GATES

[Endorsed]: Filed June 18, 1945. [23]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF EXHIBITS TO
THE UNITED STATES CIRCUIT COURT
OF APPEALS.

This cause coming on for hearing upon the motion of the respondents for an order transferring exhibits introduced in evidence at the trial of the above entitled action, and there appearing to be good cause therefor, and the libelant consenting thereto, it is hereby

Ordered that the Clerk of this Court transfer to the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, all of the original exhibits introduced by the parties at the trial in the above entitled action, and admitted in evidence.

Done in open court this 27th day of June, 1945.

JOHN C. BOWEN

United States District Judge.

Approved:

SAM L. LEVINSON

Proctor for Libelant

Presented by:

EDW. S. FRANKLIN

of Bogle, Bogle & Gates

[Endorsed]: Filed June 27, 1945. [24]

[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the Above Named Court:

You will please prepare, certify and file with the United States Circuit Court of Appeals for the Ninth Circuit apostles on Appeal, including therein the following:

1. Libel;
2. Respondent's answer;
3. The Court's oral opinion rendered at close of case;
4. Findings of Fact and Conclusions of Law;
5. Decree;
6. Petition for Appeal filed June 2, 1945;
7. Assignments of Error filed June 2, 1945;
8. Order Allowing Appeal filed June 2, 1945;
9. Citation on Appeal with acceptance of service thereon filed June 4, 1945;
10. Oral testimony taken on the part of the libelant and all exhibits offered by libelant and admitted by the Court;
11. Oral testimony taken on the part of the

respondent and all exhibits offered by respondent and admitted by the Court;

12. A copy of this Praeceptum;

13. Order to be entered by the court for transfer of [25] original exhibits to the United States Circuit Court of Appeals for the Ninth Circuit.

J. CHARLES DENNIS

United States District Attorney

By: BOGLE, BOGLE & GATES

STANLEY B. LONG

EDW. S. FRANKLIN

(Of Counsel) proctors for respondent.

Copy received June 2, 1945.

SAM L. LEVINSON

[Endorsed]: Filed June 2, 1945. [26]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States to the Above Named Libellant, Greetings:

You Are Hereby Notified that in a certain cause in admiralty in the United States District Court for the Western District of Washington, Northern Division, wherein Walter Lubinski is libellant and the United States of America is respondent, an appeal has been allowed to the United States Circuit Court of Appeals for the Ninth Circuit on the petition of respondent.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco in the State of California within forty (40) days from the date of this citation pursuant to an appeal allowed in the above entitled suit on the 2nd day of June, 1945, to show cause, if any there be, why the final decree in such appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington this 2nd day of June, 1945.

[Seal]

JOHN C. BOWEN

District Judge.

Copy received June 2, 1945.

SAM L. LEVINSON

[Endorsed]: Filed June 2, 1945. [27]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 27, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Praecipe and Designation of counsel filed and shown herein, as

the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcript of Testimony, the original of which is sent up as part of this record, constitute the apostles on appeal from the Decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, dated March 12, 1945.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [28]

Clerk's fees (Act February 11, 1925) for making record, certificate or return	
54 folios at 05c	\$ 2.70
16 folios at 15c	2.40
Appeal fee (Section 5 of Act) (\$5.00 each side)	10.00
Certificate of Clerk to Apostles on Appeal....	.50
Certificate of Clerk to Original Exhibits....	.50
<hr/>	
Total	\$16.10

I further certify that the costs of this record have been equally divided between the respective parties to the appeal.

I further certify that one-half of the total amount above, to-wit, \$8.05, has been paid to me by the attorney for the Appellee and Cross-Appellant. The remainder, in the sum of \$8.05, has not been

paid to me for the reason that the appeal on behalf of the Appellant and Cross-Appellee is being prosecuted on behalf of the Government.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 10th day of July, 1945.

[Seal]

MILLARD P. THOMAS,
Clerk

By TRUMAN EGGER
Chief Deputy [29]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

In Admiralty—No. 14,601

WALTER LUBINSKI,

Libelant,

vs.

ALASKA STEAMSHIP COMPANY, a corpora-
tion; and UNITED STATES OF AMERICA,
Respondents.

PROCEEDINGS AT TRIAL

On January 9, 1945, at the hour of 10:00 o'clock, a. m., the above entitled cause came on regularly for trial in the above entitled court, and before the Honorable John C. Bowen, one of the judges of said Court;

The libelant appearing in person and by Sam L. Levinson, Esq., proctor for libelant;

The respondents appearing by Edward S. Franklin, Esq., and Stanley B. Long, Esq., (of Messrs. Bogle, Bogle & Gates), as proctors for respondents;

Whereupon the following proceedings were had and testimony taken, to-wit: [1*]

The Court: I am expecting to have a necessary interruption by long distance telephone call within about twenty minutes or so, at which time the Court will interrupt the trial. Are the parties and counsel ready to proceed with the trial of the case of Walter Lubinski against the Alaska Steamship Company and the United States of America?

Mr. Levinson: The Libelant is ready, Your Honor.

Mr. Franklin: The Respondents are ready, Your Honor.

The Court: You may proceed. Before receiving your opening statement, it is ordered that all unpublished depositions be at this time published and filed. There seems to be quite a number of them. The jackets in which they are now contained will be destroyed by the Court, in order to free the files of the material. The Libelant may now proceed.

Mr. Levinson: This is an action, Your Honor, by Walter Lubinski, as Libelant, a seaman, against the Alaska Steamship Company, a corporation, and the United States of America, as Respondents.

The action is brought under the Jones Act, and

* Page numbering appearing at foot of page of original Reporter's Transcript.

brought under the statute, the War statute, which permits an action against the Government. It is a suit in Admiralty, and the rights are confirmed to the seaman under a pre-existing law, prior to this emergency.

Briefly, the facts are as follows—

The Court: You mean your evidence will show, or the Libelant's depositions will show the facts to be as follows. [4]

Mr. Levinson: That is right. The evidence, we believe, will establish the following facts: that Walter Lubinski, the Libelant, is a merchant seaman, and employed as a boatswain, a member of the crew of the Steamship George Flavel. He signed Articles in San Francisco, and the George Flavel is owned by the United States of America, but the Alaska Steamship Company and the United States of America operated said vessel.

The Libelant signed Articles in San Francisco, and while in San Francisco the Respondents loaded certain cargo for at that time an unknown destination. The Articles were signed on the 23rd of June, 1943, a year ago last June.

The evidence will show that the principal cargo of the vessel was military cargo, and, as subsequently discovered, cargo to be used in connection with the invasion of Kiska. Most of the cargo was stowed in San Francisco. The stowage of the cargo, although it was military cargo, was the direct responsibility of the master and the officers of said vessel. That is in view of the fact that the officers

—that is, the civil officers, the officers of the vessel, are responsible for the safety of the vessel.

Among the cargo that was stowed on the vessel were certain so-called smoke bombs, that is, the small size smoke bombs. The evidence will show they came four in a case. They are contained in metal containers, approximately of a gallon size, and these smoke bombs were stowed in the forepeak of the vessel.

The George Flavel was a Liberty vessel. [5]

The evidence will further show that the mate, as I stated, and the officers, were responsible for the stowage of the cargo, and that they negligently permitted these smoke bombs to be stowed in the forepeak, when the customary and safe practice would have been to have stowed these smoke bombs in some air-tight container, or some box or magazine which has some fire fighting apparatus, or could be controlled in the event of a fire—or they should have been stowed on the deck, away from the combustible material—or some place where they could have been controlled in the event of a fire; but, nevertheless, the mate permitted the stowage of these smoke bombs in the forepeak, along with ship's stores, and stores used by the members of the crew during the course of the voyage.

During the course of the voyage from San Francisco north various members of the crew had occasion to use the boatswain's locker, or the forepeak, and were in and out of there continually; that the smoke bombs were scattered about, they were not piled safely in the forepeak; and that one

of them, in fact, was taken out of one of the boxes—some of the boxes were open; and that on the 15th of July, when the vessel was at Attu, and they were getting ready to go ashore to assist in the invasion, getting the gear ready for that purpose, the vessel, as I stated, being loaded with military cargo containing ammunition, jeeps, ordnance in the cargo hold—it was necessary to overhaul some of the ship's gear, that is, the loading gear, to assist in getting ready for this unloading on this date, on the 15th of July, about 10 [6] o'clock in the morning, when the gear was being worked and under the charge of the boatswain—the boatswain sent one man forward to obtain some tools out of the forepeak, some large wrenches—the evidence will show exactly what was required—that this man went forward into the forepeak, and while in the forepeak he had to rummage around and look around for these tools, because of the condition of the forepeak, and the box of smoke bombs was lying about there, and while there he either kicked or threw a box containing some of these smoke bombs aside, looking for his particular items of tools.

He was in there only for a few seconds; went to one of the other rooms in the forepeak to look for it, and then finally found his tools, went up on deck, and went back to the hatch and lowered the tool into the hatch where the men were working.

He had hardly gotten in the way, perhaps five minutes, when a fire was announced in the forepeak, and it was discovered that dense volumes of orange smoke was issuing from the forepeak, and

the orange smoke was identified as smoke coming from these smoke bombs.

The general fire alarm was immediately sounded, and the men were required to take their stations to fight the fire. Keeping in mind that at this time the invasion, I think, was actually taking place, some of the boats were over the side, and the vessel was loaded with ammunition, and it was noticed that this smoke was coming from the forepeak.

The station of the boatswain, the station of the Libellant in this instance, was along with the mate, at [7] the location of the fire, and it was necessary that someone go below into the forepeak to ascertain the cause of the fire, and, if possible, to put it out.

There were some hoses, I believe, at that time playing water down into the forepeak. The forepeak was not one of those rooms which was suitable for the stowage of combustible material, or pyrotechnics, as I believe the evidence will show.

He was given a gas mask, and he went down into the forepeak, into this smoke, but because of the corrosive nature of the smoke, and the actual physical conditions, he was only able to remain down there three or four minutes, trying to find the cause of the fire.

He felt his way around there, but couldn't find it, and he went back up again. Then I believe on two or three occasions he went down trying to find the cause of this fire. In the meantime, the smoke was coming forward, and they didn't know what was causing the fire, they didn't know how far it would spread.

Finally the boatswain, the Libelant in this instance, was down there with a mask, and located the source of the fire, and with the aid of two pair of heavy leather gloves, which he wore, he got hold of or reached this smoke bomb that was causing the fire, or announced the cause of it, and it was subsequently brought up by the second mate and brought on deck, and as soon as it was brought on deck the smoke and the fire stopped.

In the meantime, of course, there had been a great deal of water in the attempt to put out the fire in the [8] hold. When the boatswain came back on these one or two occasions after he went down below, it was necessary to remove the mask, because he couldn't breathe, and when it was removed, the mask, it was united with this orange smoke, it had actually permeated the mask. There was some of his clothes—it had gone clear through his shorts into his skin, and there was even some of it on his face, and he was coughing, went to the rail, attempted to get some air, but nevertheless, as soon as he felt better he put the mask on and went down again.

After the fire was put out the boatswain apparently recovered from the choking, but he began to have trouble with his eyes. His eyes were swelled up. They began to water, and he had trouble with his eyes continuously from that time forward.

He attempted to do his work, he did do his work. He assisted in the landing at Attu, and remained with his vessel, and there was a doctor aboard the vessel. He complained or reported to the doctor,

and some attempt was made at medication, but his eyes kept getting continuously worse.

Subsequently, the following month, as a part of this same operation, the vessel moved on to Kiska and participated in the Kiska invasion, and the Kiska invasion involved the unloading of much of the cargo in No. 3 hold.

While unloading the cargo in No. 3 hold, for a cause that was subsequently discovered, fire broke out in No. 3 hold. A great deal of smoke issued from the hold,—and, of course, the vessel was still loaded with [9] many explosives and war material—and at that the boatswain was not on duty—he was in his room. Immediately upon the call of “Fire,” he went to his station to assist in putting out the fire, and he was directed again to put on a mask and go below for the purpose of finding the cause of the fire in this instance.

The Court: What date was that?

Mr. Levinson: This was on August 15, approximately a month following the first fire.

The Court: August 15?

Mr. Levinson: August 15, 1943. He went below and on his way back up the ladder in No. 3 hold some of the members of the crew who were playing the fire hose into the hold, either because of their lack of attention or excitement, and without exercising a proper amount of care, played the hose directly on the Libelant as he came up the ladder. He had a gas mask on at that time, and the water knocked it off his face and he was struck in the face with the force of the water.

All of this time he was having trouble with his

eyes and the evidence will show that the additional force of the water, the removal of his gas mask by the force of the water, and the blow did not help the condition of his eyes.

He remained on the vessel until it came to Seattle, but had trouble with his eyes continuously. The vessel went from Kiska to Honolulu first, and while in Honolulu he received attention to his eyes, medical attention. Then the vessel returned to Seattle and paid off in Seattle. It paid off on the 28th of September. [10]

He remained in Seattle a day or so and then went to San Francisco and received some medication at the hospital there. He also went to see a private doctor in whom he had a great deal of confidence, in Salt Lake City, and was treated there.

Following the original injury, that is, following the original fire on July 15, 1943, his left eye began to give him a great deal of trouble. It pained him, it watered for a while, the eyelids were swollen, and he went down and it was ultimately discovered that he had entirely lost the sight of his left eye.

The Court: What date was that?

Mr. Levinson: The date of the injury was July 15, but the development of the loss of sight did not become evident until about September.

The Court: You do not know the date?

Mr. Levinson: We do not know the exact date.

The Court: I thought you spoke of some specific medical examination.

Mr. Levinson: When he had a medical examination in Honolulu sometime early in September it was found he had practically no sight in that

eye, and it was finally determined when he was examined in San Francisco during the month of September, or towards the end of September, that the sight was practically gone.

We will show by competent medical testimony that the cause of his present condition, the permanent loss of the sight of his left eye, was the result of the exposure to the gas fumes from the smoke bomb. It was a corrosive and irritating smoke. We will show that his present [11] injury is the result of some outside force, some trauma, and resulting infection in the eyeball itself. Now he has only simple light perception in the eye. He can only tell when the light is on or off. It has no value from the standpoint of being able to use it.

We will further show he has suffered a great deal of pain, although the pain at the present time is not very persistent, but the eye will probably be removed in order to avoid the danger of affecting the sight of the other eye.

We will further show that the Libelant is a young man, twenty-eight years of age, has always been in good health, has never had trouble with his eye before, and that because of the negligence of the operators of the vessel in failing to stow the cargo properly, the negligence of the man going in and kicking the box, causing the smoke bomb lid to come off and ignite, the negligence of the operators of the vessel in permitting the members of the crew to strike him in the face with the hose, that all of these were the proximate cause of the present loss of the sight of his eye, and upon such a

showing we will ask that Your Honor grant such judgment as the Libelant is entitled to.

The Court: Does the libel state more than one cause of action?

Mr. Levinson: It states only one cause of action, Your Honor, but states the various acts of negligence.

The Court: All leading to one and the same result?

Mr. Levinson: That is correct, Your Honor. I will be very pleased to read it, because it is comparatively [12] short, and perhaps that will fix it in Your Honor's mind.

The Court: I have no desire that you do so, but I will not deprive you of the opportunity if that is what you wish.

Mr. Levinson: Well, it is very short, and I will read Paragraph III.

(Counsel reads Paragraph III of Libel.)

Then we have the allegation as to the damages, Your Honor, that we have filed a claim within the regulations provided, and more than 50 days have elapsed and the same has been disallowed.

The Court: The Respondents may make their opening statement at this time, or later, as they elect.

Mr. Franklin: The evidence in this case will disclose, if the Court please, that on or about June 23, 1943, the Steamship George Flavel was assigned by the Government to the exclusive supervision and control of the United States Army, to be used as a component of the flotilla involved in

the Attu and Kiska invasions; that in pursuance of that supervision and control executed by the Army that the Army placed aboard the Flavel certain transport officers, who were during all times involved in the voyage in exclusive control of the loading and discharging of the cargo.

The evidence will further show that as befits war times men and supplies were crowded aboard the vessel, that there were approximately twelve hundred soldiers, besides ammunition, jeeps and military equipment, in addition to the armed guard which is a permanent part of [13] the ship's personnel and accompanies it to repel aircraft.

The Court: We will take a recess at this time for five minutes.

(Recess.)

The Court: You may resume your statement.

Mr. Franklin: If the Court please, the complement aboard the Flavel as she left for the Alaska invasion included twelve hundred soldiers, what is known as an amphibious crew, comprising approximately nineteen or twenty members, with their equipment, which consisted of eight landing barges, and as Your Honor knows, their function in the case of a landing is to carry the troops and the supplies to the shore after the landing is effectuated.

As part of their equipment and for use in the landing craft there was a number of smoke distress signals aboard the vessel. These smoke distress signals are commonly used in military enterprises, normally at sea, and their purpose is that in the event a boat is forced at night to be out on the

water, a life boat, or any similar situation, they discharge this distress signal by pulling or removing a cap, and as the gas in the signal is lighter than air it rises, and as it rises it illuminates the air, in this case with an orange color which is visible and perceptible for miles around, and leads to the ultimate rescue of the boats at sea.

The record will show that these distress signals were carefully enclosed in cartons of four apiece, and comprised a tin or receptacle which can be referred to as like a gallon tin, and sealed or secured with a cap [14] which screwed and fitted in tightly into the top of the container, and which had to be removed to permit the escape of the contents of the smoke distress signal.

The evidence will further show that because of the congested conditions prevailing aboard the vessel it was not possible to stow this equipment of bombs, plus other paraphernalia to be used by the landing crew, anywhere other than on the forward portion of the deck. And in addition to the smoke bombs there was foodstuffs which would be put in the landing craft, and the mate, a Mr. Kristiensen, seeing that this equipment of the landing crew was exposed to the wet and the dampness prevailing on the trip to Attu, upon the request of the Ensign, gave permission to store this equipment in the forepeak, which was the only and best place available for this ammunition and war accoutrement.

The evidence will further show that this equipment was stored in the forepeak, which, as Your Honor recalls, is a compartment just below the ex-

treme forward portion or stem of the vessel, and that this forepeak is commonly used for the location of certain gear carried by the ship; that the entry into this forepeak is gained ordinarily, or is available to, besides the ship's officers, only to the boatswain, who in this case is the Libelant, Mr. Lubinski.

The evidence will further show that he was in charge of the stowage of this equipment. The evidence will further show that he frequently visited the forepeak in the course of his particular duties, and on the day in question had been there at numerous times. [15]

The evidence will further show that the ship's officers granted permission to the members of the landing craft to work on their guns and equipment in the forepeak, and that they so used the forepeak during the period of time the vessel was en route to Attu, and up until the Attu incident of July 15, 1943.

The evidence will further show, as recounted by Mr. Levinson, that about 10 o'clock on the evening of July 15, 1943, orange smoke, obviously from a discharged or leaky smoke bomb, was discovered billowing out of the forepeak, and that a crew of four went up from the vessel, and in response to the signal various members of the ship's crew and officers attended the forepeak.

The evidence will show, Your Honor, that not only Mr. Lubinski but various of the ship's officers went down below to investigate the cause and the location of the smoke bomb, that on going below

Mr. Lubinski was furnished with an Army gas mask, which was sound and safe and satisfactory in all particulars; that Mr. Lubinski was down there on two or three occasions, and that the smoke bomb was discovered and brought out on the deck in a discharged condition; that when the smoke bomb was brought to the deck the discharged smoke bomb, it was not in a container, that the cap had been removed, and the cap was never located or discovered.

The evidence will further show that someone had apparently broken into one of the cases containing four smoke bombs, because one bomb was missing from the lot.

The evidence will further show that the Libelant made no complaint of any trouble with his eye on July [16] 15, 1943, or thereafter, either to the mate or to the doctor aboard the vessel, a medical officer who was carried as a transport surgeon aboard the vessel.

The evidence will further show that the vessel continued on to Kiska and anchored off the beach-head on the morning of the invasion, August 15, 1943; that the landing craft left the vessel carrying the soldiers ashore, and were shuttled back and forth to get needed cargo from the hold; that the holds were being discharged at that time under the exclusive jurisdiction and supervision of the officers of the United States Army; that in the process of discharging, a soldier apparently attempted to start a "snow jeep" in No. 3 hatch, and the

“snow jeep” backfired, and as a result of that backfire a fire occurred down in No. 3 hold.

The evidence will show that the various ship’s officers, put the fire out, and after the fire was out an investigation was made and it was discovered that the jeep was on fire and was the cause of the fire.

The evidence will show that not only the ship’s officers but Mr. Lubinski had masks on, and wore the masks during all of the period, except for the period of time that Mr. Lubinski claims that the mask which he was wearing was knocked off while he was down below in the hatch, by certain individuals of the crew standing up on the top of the hatch, and who through the dense smoke pervading the hatch were playing the hose down below.

The evidence will show that the exposure in period of time on this Kiska incident, when Mr. Lubinski claims that the mask was knocked off, was not over twenty [17] seconds.

We think, if the Court please, that with those facts before it the Court must find that this is a case which is compensable only under the Second Seaman’s War Risk Insurance, and that for the loss of sight claimed by Mr. Lubinski, if it resulted from those two incidents, it is the result of a war risk, or war-like exposure, and by reason thereof Mr. Lubinski’s rights are governed exclusively by the Second Seaman’s War Risk.

Mr. Levinson: Your Honor, I would like to interrupt Mr. Franklin. No allegation of such a nature is made in the answer, and it is entirely a

new defense, that is, of the war risk. The answer is general denial and contributory negligence, and I do not think it is proper to go into that.

Mr. Franklin: I do not think I am required that, Your Honor. I am merely stating what our position is.

The Court: You may proceed. You have knowledge of Counsel's objection now, and you may proceed, and you may expect that I will assume that objection may be made to testimony along this line.

Mr. Franklin: Yes, Your Honor. We will further show, if the Court please, that the unfortunate condition from which the Libellant is suffering is known in medicine as iridocyclitis or uveitis. Those words, in medicine, mean an infection or inflammation of the inner portions or inner chamber of the eye, affecting the iris and adjacent organs, and that this condition can only medically result, with reference to injury, by a penetrating injury which penetrates into the inner mechanism of the eye, and [18] affect the iris, and that the only other cause, and the usual cause for this condition is some bodily systematic condition, such as the teeth, infections of the teeth, tonsils, syphilis, gonorrhea, tuberculosis, sinus trouble, or any infectious condition in the body, and that it would be medically impossible by exposure to smoke or any chemical to affect—to either cause or aggravate this condition.

When we have presented evidence along those lines, Your Honor, we feel that Your Honor will properly dismiss this action with prejudice.

Mr. Levinson, I presume that we can stipulate at this time that the Alaska Steamship Company, the general agent, may be dismissed?

Mr. Levinson: Not in this case, because the proof will show otherwise.

Mr. Franklin: Very well. The Respondents move at this time that all witnesses, other than medical witnesses, be excluded from the courtroom.

Mr. Levinson: The only witnesses I have are not witnesses as to any of the events which occurred on the vessel. I have some witnesses here to testify as to custom, to testify as to safe ship practices, and I believe that under the rules the Court has discretion in the matter. If Your Honor insists upon it, we will do it.

The Court: It is not the Court insisting upon it. It is the duty of the Court to pass on the motion.

Mr. Levinson: None of these witnesses will testify to any facts that occurred on the ship. I will so state to Counsel now. If he stills wants to make this motion, [19] in the light of those facts, it is up to Counsel.

Mr. Franklin: I think they should be excluded, if the Court please.

The Court: I think ordinarily, gentlemen, that upon a motion to exclude witnesses the motion is usually granted, with the exception of those whose aid in the conduct of the trial is needed and is proper to be had. Was there an exception to it?

Mr. Franklin: Medical witnesses, Your Honor.

The Court: With the exception of medical witnesses, and I suppose that means the doctors. Is that what you mean by that?

Mr. Franklin: Yes, Your Honor.

The Court: The other witnesses will now be excluded from the courtroom, and the witnesses will retire and remain in the witness room or in the corridors until you are called to the courtroom. The Libelant may call his first witness.

(Witnesses excluded.)

Mr. Levinson: I will ask Mr. Lubinski to take the stand.

WALTER LUBINSKI

called as a witness on behalf of Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Levinson:

Q. Will you state your name, please? [20]

A. Walter C. Lubinski.

Q. How old are you, Mr. Lubinski?

A. Twenty-eight.

Q. What has been your occupation?

A. I have been a seaman all my life.

Q. How many years have you actually followed the sea? A. Since 1935.

Q. In the last few years what has been the nature of your service on a ship; what jobs do you usually hold?

A. The last three or four years I have been sailing as boatswain.

Q. In what department of the ship?

A. The deck.

(Testimony of Walter Lubinski.)

Q. Mr. Lubinski, were you a member of the crew of the Steamship George Flavel, which signed on in San Francisco in June, 1943?

A. I was, sir.

Q. Where did you join that vessel?

A. San Francisco.

Q. At the time you joined the vessel, by whom were you employed, and what is your recollection of the person who employed you?

A. I was employed by the Alaska Steamship Company.

Mr. Franklin: If the Court please, we move that answer be stricken upon the ground that it is the conclusion of the witness.

The Court: The objection is overruled and the motion denied.

Q. (By Mr. Levinson): At that time was there any statement made to you that any other person was your employer? [21]

A. No, sir.

Q. Mr. Lubinski, after you joined that vessel were you present at the loading of the cargo on that vessel?

A. Yes, sir; I was present.

Q. You joined it, as I understand, in the capacity of boatswain?

A. Boatswain; that is right.

Q. Where was the vessel when you joined it?

A. She was in San Francisco, Pier 48.

Q. How long did you remain in San Francisco?

A. Excuse me, sir—Pier 45.

Q. How long did you remain in San Francisco during the process of loading?

(Testimony of Walter Lubinski.)

A. I think about seven days.

Q. Do you recall whether the loading took place at that particular dock?

A. Yes, sir. We loaded all at one dock.

Q. Were you present during the loading of the cargo?

A. I was present during my regular working hours when we were loading.

Q. What were your regular working hours?

A. On 8 to 5.

Q. When you are ashore you stand shore watches? A. Regular day work.

Q. What was the general nature of the cargo which was being loaded at that time?

A. They were loading coal and wood, gasoline, ammunition, jeeps, a few trucks and foodstuffs.

Q. Was there also some military ordnance, as you call it? A. Yes, sir. [22]

Q. The George Flavel is what type of ship?

A. Liberty.

Q. How many hatches has she? A. Five.

Q. How many forward of the house?

A. She has three.

Q. How many aft? A. Two.

Q. It has a forepeak? A. Yes, sir.

Q. At the time of the loading of said vessel who was in charge of the loading of the vessel that you were able to observe?

A. I was able to observe the chief mate and the mates on watch.

Q. Was the captain about, the skipper?

(Testimony of Walter Lubinski.)

A. I seen the captain just before we sailed. The day before we sailed he was making an inspection of the ship, to see how the cargo was stowed on the deck. We had a couple of barges on deck.

Mr. Franklin: That is not responsive, if the Court please.

The Court: Just answer the question each time. Have in mind the specific question and answer that. The answer may be stricken.

Q. (By Mr. Levinson): I first asked if the captain was about. You can answer that yes or no. Was the captain about? A. Yes, sir.

Q. State the occasion when you saw the captain, or when you, [23] yourself, participated with the captain in connection with the investigation or inspection of any loading?

A. A few hours before we sailed I had the gang working at No. 2, securing a Jumbo, and the captain was making an inspection to see how everything was secured, and we had a little chat on deck, and he went on about his business making his inspection.

Q. Was there any Army officers or personnel, as far as you could see, that exercised some supervision in connection with the loading?

A. No, sir. They have a civilian supercargo.

Q. Were there some Army officers in charge?

A. There was lots of Army officers about. I don't know whether they were in charge. I know the cargo was under the supervision of the civilian cargo superintendent.

(Testimony of Walter Lubinski.)

Q. What was the mate's duty, as far as you were able to see, in connection with advising and conferring with the civilian supercargo?

A. His regular duties. He is the chief mate; he is in charge of the loading. He cooperates. The cargo supercargo cooperates with him.

Q. Are you able to state, either of your own knowledge or from what you observed, whether the Army officers aboard had any experience in connection with loading vessels? First, the answer to that would be yes or no—can you state?

A. Yes.

Q. What was your observation, and how did you reach that conclusion?

A. The Army officers that were on board were supposed to [24] have been the loading officers. From my observation, which took about five minutes, they had never seen a ship before.

Q. Can you state whether or not there was any reliance put on the ship's officers by those men?

Mr. Franklin: If the Court please, that is objectionable.

The Court: Objection sustained. You can ask what they did.

Mr. Levinson: Very well, Your Honor.

Q. (By Mr. Levinson): What did they do in connection with the stowage and in connection with any conference or participation with the mate?

A. Well, they introduced themselves to the mate, and the mate introduced me to them, and we cooperated with them as much as we could, because

(Testimony of Walter Lubinski.)

we knew they had never seen a ship before, and never knew the way of stowage of cargo or anything like that. We cooperated with them one hundred per cent, me and my men.

Q. You are familiar with the forepeak?

A. Yes, sir; I am.

Q. What is normally and usually kept in the forepeak?

A. What is usually kept in the forepeak is all the deck equipment, Manila lines and wires and shackles and blocks, and different deck gear.

Q. How about the carpenter shop?

A. Just the carpenter's equipment, tools.

Q. How long have you been going to sea?

A. Since 1935.

Q. What has been the practice in connection with keeping [25] similar items in the forepeak on other American merchant vessels?

A. I do not understand you.

Q. I will restate it. What are the usual and customary items that are kept in the forepeak of American merchant vessels?

A. Well, you have Manila lines, you have all your deck equipment, shackles, blocks, cluster lights, shovels.

Q. What does good seamanship require in connection with the stowage of any combustible or pyrotechnic material in the forepeak?

A. According to good seamanship, it should be placed in an air-tight locker or some place on deck

(Testimony of Walter Lubinski.)

where air cannot get into it—or a metal container, a sealed container.

Q. Do you know of any Coast Guard regulations in connection with such stowage?

A. Yes, sir; I do.

Mr. Franklin: That is objected to as not the best evidence.

The Court: Read the question, please. (Last question and answer read.) The objection is overruled.

Q. (By Mr. Levinson): When the vessel sailed or at a time ahead of when she sailed, how was she loaded with reference—strike that. Did you see any smoke bombs in the cargo of that vessel?

A. No, sir; I did not.

Q. Do you know what a smoke bomb is?

A. Yes, sir.

Q. That is commonly known as pyrotechnical material?

A. That is right. [26]

Q. What is the customary and usual procedure with reference to the stowage of smoke bombs of that nature?

A. It should be the proper procedure, and the regulations even in war time, laid down by the United States Coast Guard—

Mr. Franklin: No; we object to that.

Q. (By Mr. Levinson): Do not tell us what the regulation is. Just state what is the proper procedure.

A. The proper procedure is for it to be stowed

(Testimony of Walter Lubinski.)

somewhere where there is a steam smothering system, or sprinkler system.

Q. Are there such provisions and systems on a Liberty ship? A. Yes, sir.

Q. What provisions are there in the hold in connection with any steam smothering system or fire prevention system?

A. They have steam smothering systems.

Q. Have you a steam smothering system or fire prevention system in the forepeak?

A. No, sir.

Q. And did you have it on that particular vessel?

A. No, sir.

Q. What is the customary provision in connection with the stowage of any smoke bombs which are to be used in the boats? Where are they usually stowed?

Mr. Franklin: Do you mean during peace time or during war time?

Mr. Levinson: During all times now.

Q. (By Mr. Levinson): Where are they stowed?

A. Like I told you, they stow them in a locker some place where it is air-tight, or a metal container. [27]

The Court: In a locker?

The Witness: Yes, sir.

The Court: Are lockers provided for them in a Liberty ship?

The Witness: Yes, sir. They have various lockers on deck.

(Testimony of Walter Lubinski.)

Q. (By Mr. Levinson): Are there any lockers about the mast, on the mast table?

A. Yes, sir.

Q. Are there any lockers in connection with the——

Mr. Franklin (Interposing): Do not lead the witness.

Q. (By Mr. Levinson): Are there any lockers about the house, on deck?

A. Well, I cannot answer that yes or no. It pertains to various Liberty ships.

Q. Liberty ships of the type of the George Flavel, they are all one type, aren't they?

A. Yes, they are all one type, but they have additions built to them, after they are built. After they make a voyage or two they build additions to them at various times.

Q. Do you recall any on the George Flavel on the deck near the forepeak or the house?

A. I think there was one just right between the break of the house and what they call the doghouse, that they have built on there in addition to carry additional men, twenty-five men. What they call doghouses.

Q. Where is that?

A. On the boat deck. [28]

Q. Do you recall when you arrived at Attu?

A. I think it was about July 15, 1943.

Q. What were you doing on the day of this fire, or just prior to this fire in the forepeak?

A. We were working a pretty long shift, all

(Testimony of Walter Lubinski.)

right. We were on deck about twenty hours and working down in No. 2 hold.

Q. That is one of the holds in the forward part of the ship?

A. One of the holds in the forward part of the ship.

Q. What were you doing in No. 2 hold?

A. We were working on a Jumbo, because the purchase had an awful lot of twists in it, and we were lifting some heavy "cats," some of them weighing from seven to ten tons. The Jumbo kept twisting as we kept bringing them aboard, and if that keeps on the wire will crystalize and somebody will get killed. We had to lay the diamond block into the hold, and we had to take the shackle pins out to get the turns out, and we didn't have enough tools, and I sent one of them men forward to get some tools.

Q. Do you recall who you sent forward?

A. I do not.

Q. You subsequently learned who it was?

A. I did afterwards. I just learned the last couple of days.

Q. What happened when he came back?

A. This particular man that I sent for the tools, this seaman, he lowered the tools in the hold, and about the time the tools were lowered somebody started to shout "Fire," and the alarm started going.

Q. The general alarm? [29]

A. The general alarm.

(Testimony of Walter Lubinski.)

Q. Were you in convoy of other ships at that time?

A. No; we were in Attu, already.

Q. Then what happened after the alarm of fire?

A. I came up the ladder with the rest of the men, and all we had to look at was to look forward and you could see that everything was—there was much orange smoke coming out.

Q. Where was the smoke coming from?

A. Coming through the ventilators and the square of the forepeak hatch.

Q. How do you get into the forepeak hatch?

A. It is about a three foot square, and has a ladder that goes straight down.

Q. How far is it from the exit to the point—

A. (Interposing): I would say three feet or four feet at the most.

Q. What happened when you got up on deck?

A. Naturally, I ordered the men right away to rig up hoses, which was done immediately, and some of the men went down back aft—or midships, rather—and got some masks, and I was the first man that went down there. None of us knew what it was; we had never seen it before because it was something new.

Q. It was your organization of the ship, prior to the time you were involved in the emergency—the creation of a so-called emergency squad?

A. Yes, sir.

Q. Was there such an emergency squad on this particular vessel? [30]

A. Yes, sir.

(Testimony of Walter Lubinski.)

Q. What position did you hold, or what job did you have on that emergency squad?

A. I was second in command to the chief officer.

Q. Who was the officer in command?

A. The chief officer.

Q. Was he chief officer at the time?

A. We were there first, and he came a few seconds after we did.

Q. What is your station in the event of an emergency alarm?

A. I am to take charge, direct the men to fight it with whatever means we have. That was until the chief officer arrived at the scene of the fire.

Q. Are any orders required with reference to you going blow or doing what you can to put it out?

A. No.

Q. You are second in command?

A. That is right. I am to use my own discretion.

Q. When you got up there how did it look, when you first got there?

A. There was lots of it pouring out. It was all orange color.

Q. Did you know at that time what the trouble was? A. No, sir. None of us knew.

The Court: Did anyone direct you specifically, pick you out and tell you to go forward and make the investigation?

The Witness: No, sir.

The Court: You just thought that somebody ought to do it? [31]

The Witness: Nobody has to, sir. I am second

(Testimony of Walter Lubinski.)

in command of the emergency squad, as deck boss, and that is my job.

The Court: You thought of your own volition that it was up to somebody to go, and, therefore, you chose to go yourself?

The Witness: Well, if I didn't choose to go myself——

The Court: Just answer the question.

The Witness: Yes, sir.

Q. (By Mr. Levinson): If you had not gone, what would have been the result?

Mr. Franklin: That is objectionable, Your Honor.

The Court: Objection overruled.

Q. (By Mr. Levinson): If you had not gone?

A. I don't know. Of course, everybody would have run around like a bunch of wild Indians.

Q. With reference to your duties, did going forward and going below have anything to do with your duties? A. Yes, sir.

Q. Is that part of your regular duties?

Mr. Franklin: That question is objected to as leading.

The Witness: Yes, sir.

The Court: Objection overruled.

Q. (By Mr. Levinson): After you got there, go ahead and tell the Court what you did.

A. Well, about that time we got up there the men got two hoses rigged all ready, and they were pouring them into the forepeak; and the chief officer arrived there then.

(Testimony of Walter Lubinski.)

Q. What were they pouring into the forepeak?

A. Water.

Q. Then go ahead and tell what you did.

A. One of the men—I don't know who it was—about that time arrived with two or three gas masks, and I put one on, and I was the first man that went down. I was down there about four or five minutes and I came back up.

Q. How far down did you go?

A. I went to the first deck of the forepeak.

Q. What did you do?

A. I couldn't see anything—just feeling my way around, trying to find the source. The magazine is right aft of the carpenter shop, and that is what we are always scared of.

Q. What is immediately aft of the forepeak?

A. The magazine.

Q. What is in the magazine?

A. Ammunition.

Q. Then what is the danger of any fire or great amount of heat in the forepeak?

A. A great amount of heat that will hit that bulk-head will blow up the whole ship.

Q. You knew that when you went below?

A. Yes, sir.

Q. How long were you down the first time?

A. Just four or five minutes, I would say.

Q. Did anybody else go down with you the first time?

A. The first time no one went with me.

Q. What caused you to come up?

A. It was getting pretty bad down there.

(Testimony of Walter Lubinski.)

Q. What do you mean by "pretty bad?" [33]

A. Well, those respirator masks are probably all right out in the air, it is regulation Army to repel any kind of a gas; but in an enclosed place like that they are not the proper equipment.

The Court: I call the attention of Counsel to the fact that the witness is inclined more often to give his explanatory statements than he is to answer the questions. Try to hold his attention to the form of the question.

Mr. Levinson: Will you give me a moment, please, Your Honor?

The Court: Yes.

Mr. Levinson: I ask that the answer be read.

The Court: The answer may be read.

(Answer of witness read.)

Mr. Franklin: I move that the answer be stricken.

The Court: It is stricken, and the Court will disregard it.

Q. (By Mr. Levinson): What was your physical condition during the time you remained down, at the end of the time you were there the first time? What happened to you?

A. It got stuffy.

Q. With reference to your breath; could you breathe?

A. I was breathing, but it was getting pretty hard. That is the reason I came up.

Q. When you got up, how long did you stay up?

(Testimony of Walter Lubinski.)

A. Oh, a couple of minutes. I stood over near the rail.

Q. What did you do?

A. I took off my mask and went over to the rail to get some air. I went down again the second time with the second mate. [34]

Q. What did you find, if anything, the second time? A. We didn't find anything.

Q. Did you go down at a later time again?

A. Yes, sir.

Q. How many times did you go down?

A. Oh, I don't know; five or six, or maybe three or four. I don't remember exactly.

Q. During all of this time what was the condition of the forepeak and the port deck at the entrance to the forepeak, with relation to any smoke.

A. She was still plenty thick down there.

Q. And you could not see?

A. We had flashlights with us, but they didn't do very much good. We felt our way around.

Q. What kind of smoke was it?

A. Orange colored smoke.

Q. Did you ultimately find the source of this smoke?

A. Yes. The second mate or somebody—I just don't remember exactly who found it.

Q. Did you locate it yourself?

A. No, sir. Somebody else found it down there.

Q. Were you on deck when the canister, or whatever emptied the smoke, was brought up?

A. Yes, sir; I was on deck, but I don't remem-

(Testimony of Walter Lubinski.)

ber who brought it up.

Q. Did you observe the cannister?

A. Yes, sir.

Q. What was it?

A. It was a gallon can type, or container. It was very charred, burned. [35]

Q. Up to the time it was brought on deck did you know the cause of the fire below?

A. No, sir. Nobody knew.

Mr. Franklin: We move that the answer be stricken upon the ground that it is the conclusion of the witness. He can only answer for himself.

The Court: I will overrule that objection. The Court will consider it under all the circumstances.

Q. (By Mr. Levinson): Mr. Lubinski, had you seen the smoke bombs or distress signals on the vessel before, or similar ones on other vessels?

A. No, sir.

Q. Do you know what they contain, the chemical substance?

A. No; I do not.

Q. You can answer that yes or no.

A. No, sir; I do not.

Q. You are not a chemist?

A. No, sir.

Q. Had you or any of the men ever received any instructions in relation to your association with these smoke bombs, or did any appear on the bombs that you saw, or other bombs that you have seen, if you have seen them?

A. They appeared on these, yes.

Q. What was the nature of the instruction? What did it say on them?

(Testimony of Walter Lubinski.)

A. It tells you it is a distress type of signal, and to be thrown over to the lee of you.

Q. To the what? A. To the leeward.

Q. What does that mean? [36]

A. It means don't throw it into the wind; throw it away from the wind so that it blows past you instead of towards you.

Q. After this fire was put out—how long did it take, altogether to put out this fire?

A. I guess half an hour; somewhere around there.

Q. Do you remember what you had on at the time you went down to the fire, what clothes you were wearing?

A. I had a pair of heavy underwear on, and I had Frisco jeans.

Q. What is that?

A. That is heavy dungarees, black dungarees, and a heavy white wool short, top short, and a parka over the top.

Q. Was your parka on over your heavy clothing?

A. It had no head piece. The head piece was off—just the cut-apart.

Q. Was that what you were wearing when you went below? A. Yes, sir.

Q. Do you remember the condition of the weather up there in July?

A. It happened to be odd. She was pretty cold that day.

Q. Although it was July?

(Testimony of Walter Lubinski.)

A. Although it was July; yes, sir.

Q. When you came up, and when the fire was put out, what was the condition of your clothes in connection with any residue or any material?

A. Well, it looked like I had an orange colored suit on.

Q. Did any of it permeate your body, or did you notice it on your body?

A. I noticed it on the bare parts of my face and neck. [37]

Q. How did it feel to your eyes?

A. It burned, burned very badly.

Q. Do you remember, or can you tell us whether or not any of the smoke permeated your clothes?

A. It went through the parka, under the heavy woven wool short, the top short I had.

Q. Was the parka buttoned and closed up?

A. It was one of those that goes over your head, with a detachable head piece.

Q. It doesn't button in front at all?

A. No.

Q. You say there was something underneath the parka, on your shorts? A. Yes, sir.

Q. Did you have a cap on, do you remember?

A. I took the cap off to put the mask on.

Q. By the way, during the course of this fire was any order given in connection with the boat, or was that at a later date?

A. That was at a later date.

Q. Will you tell the Court what developed in

(Testimony of Walter Lubinski.)

connection with your physical condition, your eye, and how you felt following this fire?

A. Well, following that I went down to the Army doctors and they washed my eyes out with boric acid, so then we had some longshoremen aboard, and the mate told me that he told the gang to go below, because we had a pretty long——

Mr. Franklin (Interposing): Just a minute, if the Court please; I object to that.

Mr. Levinson: I do not think it is material. [38]

The Court: Do not say what the mate said.

Q. (By Mr. Levinson): Go ahead, tell how you felt.

A. I went down below and washed my eyes out, and then I knocked the gang off and went below.

Q. When did you turn to again, if you remember?

A. We turned to again at 1 o'clock in the morning, but before that I was pretty sick.

Q. You say you were pretty sick; how did you feel, and why and where?

A. Well, about five or six hours later both of my lids were pretty badly swollen.

Q. How long did that condition continue?

A. That continued for a couple or three days, and then the swelling disappeared.

Mr. Franklin: What disappeared?

The Witness: The swelling.

Q. (By Mr. Levinson): How did your eyes feel during that period?

A. My left eye was starting to bother me.

(Testimony of Walter Lubinski.)

Q. Bother you in what way?

A. It was aching, and getting pretty sore.

Q. It was sore?

A. Yes; the same as a toothache, I guess you would call it.

Q. Like a toothache? A. Yes, sir.

Q. How long did that ache continue after that?

A. It just kept growing worse all the time.

Q. Did the doctor aboard the ship give you anything for it, or give you any treatment for it?

A. He did the best he could, twice a day.

Q. What would he do? [39]

A. He would wash my eye out and put some salve on it. That is all he could do.

Q. How did your eye feel during the period between July 15, 1943, the day of this fire, and the occurrence of the second fire, when the ship was at Kiska—that would be on August 15?

A. It was growing steadily worse and was badly inflamed.

Q. Did your vessel participate in the invasion of Kiska? A. Yes, sir.

Q. Were you in convoy at that time?

A. Yes, sir.

Q. There was an incident of a fire that occurred while the vessel was in Kiska? A. Yes, sir.

Q. What time of day was that?

A. I guess it was around between ten and twelve in the morning, somewhere around there.

Q. Where were you when the alarm of fire was first called out? A. I was in my room.

(Testimony of Walter Lubinski.)

Q. What is your station upon such an alarm?

A. Emergency squad, second in command.

Q. What did you do when the alarm of fire came?

A. When I heard the alarm given I waited for the full ring. You have a set amount of ring for fire and different attacks, and when I realized it was fire—the bell was right outside of my room, and I was standing there waiting for the set amount of rings, and everybody was all hollering “Fire forward,” and I went forward, and here was tons of smoke coming out of No. 3 hatch. [40]

Q. What did you do when you got to No. 3 hatch?

A. Four or five of us—the second mate and myself, and the third mate, and two or three soldiers and sailors went down below again.

Q. Could you see down into the hatch at that particular time?

A. At different intervals, when the draft blew in and out.

Q. Do you know what was in the hatch at that time?

A. Coal, wood, personal belongings, and “snow jeeps.”

Q. Did you go down into the hold?

A. Yes, sir.

Q. What was your purpose in going down into the hold?

A. We wanted to discover the source of the

(Testimony of Walter Lubinski.)

fire, because we didn't know what started it. None of us knew.

The Court: At this point we will take a ten minute recess.

(Recess)

The Court: You may proceed.

Mr. Levinson: Your Honor, in view of the fact that I have one witness who will not be here at 2 o'clock, would Your Honor permit me to withdraw this witness?

The Court: Yes; you may do that.

(Witness Temporarily Excused)

NICHOLAS M. GLADIS

called as a witness on behalf of Libelant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Levinson: [41]

Q. Will you state your full name, please?

A. Nicholas M. Gladis.

Q. Mr. Gladis, what is your occupation?

A. I am a merchant seaman, sir.

Q. How long have you been a merchant seaman?

A. Twenty-three years.

Q. Are you presently active in that occupation?

A. Yes, sir.

Q. Have you sailed on Liberty vessels?

A. I have, sir.

(Testimony of Nicholas M. Gladis.)

Q. Have you sailed on Liberty vessel carrying an Army cargo, such as ordnance and explosives?

A. Yes, sir.

Q. In your experience as a merchant seaman, what is the customary practice in connection with the stowage of any kind of explosive or pyrotechnical material in the forepeak?

Mr. Franklin: If the Court please, there is no evidence of any explosive material in this bomb; and, secondly, the question is objectionable because it is not related to the facts of this case, to a military vessel under the exclusive jurisdiction of the United States Army, participating in an invasion.

The Court: The objection is overruled.

Mr. Levinson: Will you read the question?

(Last question read)

Q. (By Mr. Levinson): Can that be done?

A. No, sir.

Q. Will you state why not?

A. I will tell the reason why; in going up North there is [42] an awful lot of dampness that you have in them forepeak, and you haven't got the facilities of securing any of them cans up there, in any way or form. There is only one set of shelves that you have on the port side, and that is where all your slings and other rope in working your cargo is kept.

Q. With relation to a set of shelves, what type of ship are you referring to?

(Testimony of Nicholas M. Gladis.)

A. The Liberty ship, sir.

Q. Are there any provisions on a Liberty ship for the stowage of this type of material?

A. There is, sir.

Q. Where is such provision?

A. When I was on the Henry Falen——

Q. Do not give a specific instance unless required to, but tell generally what is the condition.

A. When I was on this Liberty ship they had provisions on the forward part of No. 4 hatch, when I first came aboard that ship, and when I looked in there and I seen all these cans of various chemicals, I asked the mate——

Q. (Interposing): You cannot tell what you asked the mate. Describe the place where they were stored.

A. It was on the forward part of No. 4 hatch. They had a locker there especially built for carrying these chemicals.

The Court: Mr. Levinson, try to insist that the witness answer the question you ask, and not some other question.

Mr. Levinson: I understand that, but we sometimes [43] witnesses, Your Honor——

The Court: That is true, but stop him.

The Witness: I am sorry, but I have never been in these places before.

Q. (By Mr. Levinson): Mr. Gladis, what provisions are there on Liberty ships with reference to any space in the mast table, underneath the mast table? Are there any lockers there?

(Testimony of Nicholas M. Gladis.)

A. No, sir. I do not think you could keep anything underneath them shelves there in them Liberty ships. If you did keep something there it might be a bucket, or something like that—with the way the ship sheers down, see. You haven't got the space there.

Q. Were you talking about the forepeak or the deck? A. The forepeak, sir.

Q. I asked you about the deck. What provisions are there on the deck, by the mast table?

A. In the mast houses you have one on the starboard side, forward of No. 2 winches, and then you have two lockers in the mast house, at the forward part of No. 3 hatch.

Q. Are they on deck?

A. They are on deck, sir.

Q. Are they suitable for the stowage of this kind of material? A. Yes, sir; they are.

Q. What is the custom, or what are the requirements, if you know, of any requirements in connection with the stowage of such material in any place where there are no fire fighting, automatic fire fighting facilities?

Mr. Franklin: If Your Honor please, obviously that [44] is not the best evidence. The best evidence would be the requirements themselves, and not the opinion of this witness as to what they are.

The Court: Read the question, please. (Last question read.) Objection sustained. It is not clear.

Q. (By Mr. Levinson): What is the custom

(Testimony of Nicholas M. Gladis.)

and the practice in connection with the stowage of such materials in places where there are no automatic fire fighting facilities?

A. I would take it, from what I have seen aboard ships, in water-tight lockers with no ventilation in there, that would be dogged down in the event that anything happened, so they would be air-tight, and no ventilation would be able to bring up any fire.

I have had experience in carrying on these troop ships 5-gallon cans of gasoline, with all the troops being on deck to see about the hazardous smoking, and the way they are throwing their cigarettes—

Mr. Franklin: (Interposing) If the Court please, I move that the entire answer of the witness be stricken as not responsive.

The Court: Personally, I think none of it is responsive. There may be some parts that are. If there are any such, you can ask him again, ask him some question, and have him give consideration to the question. The whole thing is stricken. Ask him another question, or you can ask him the same one.

Mr. Levinson: Mr. Reporter, will you read the question again?

(Last question read)

Q. (By Mr. Levinson): Just tell the general custom, and do [45] not give any specific instances.

A. I have always put them in a mast house locker on deck.

(Testimony of Nicholas M. Gladis.)

Q. Is that the general custom?

A. That is the general custom with me, sir.

Q. Is that the general custom on Liberty ships?

A. Yes, sir.

Q. Mr. Gladis, is the forepeak of a Liberty ship of the type of the George Flavel, is the forepeak of such a nature that it permits the stowage of combustible material such as pyrotechnic bombs?

Mr. Franklin: That is objected to, if the Court please. There is no evidence that this is a combustible material.

The Court: The objection is overruled.

Q. (By Mr. Levinson): Did you get the question, Mr. Gladis? A. Yes, sir.

Q. Is the forepeak such a place where you could stow it? A. No, sir.

Q. Mr. Gladis, in your experience, who is responsible for the safety of the ship with relation to the stowage of the cargo?

A. The chief mate, sir.

Q. The fact that you are carrying war cargo, does that affect the responsibility?

Mr. Franklin: Your Honor, that is obviously objectionable.

The Court: The objection is sustained. Ask him what the practice is.

Q. (By Mr. Levinson): Does the practice of carrying war cargo affect such responsibilities? [46]

A. Upon the mate; yes, sir.

Q. Whose responsibility is it when you carry war cargo? A. The chief mate's, sir.

(Testimony of Nicholas M. Gladis.)

Q. Does that same responsibility exist at the present time, under present war conditions?

A. I could not tell that definitely, sir, because with these security officers that we have for the Army, they might have their finger in it, for all I know.

Mr. Long: Just a minute; that is precisely what I anticipated the witness would say, and I move that all his previous answers be stricken. This witness has no knowledge as to what the arrangement was on this ship. It was taken over by the Army.

The Court: The objection is overruled. Motion denied.

Mr. Long: Exception, Your Honor.

The Court: Exception allowed.

Q. (By Mr. Levinson): You have traveled on Liberty ships carrying war cargo?

A. Yes, sir.

Mr. Long: I object to this line of testimony unless it is shown that this witness is doing something more than sitting here guessing about what the condition was on this ship, having shown no knowledge of what the situation was in respect to the operation of the ship as compared with other ships.

The Court: The objection is overruled.

Mr. Long: An exception, please.

The Court: Exception allowed.

Mr. Levinson: Read my question, Mr. Reporter.

(Last question read)

(Testimony of Nicholas M. Gladis.)

Q. (By Mr. Levinson): Is there any difference in the responsibility on these ships carrying war cargo?

Mr. Long: We make the same objection.

The Court: The objection is overruled.

Mr. Long: Exception, please.

The Court: Exception allowed.

Q. (By Mr. Levinson): Do you understand my question, Mr. Gladis?

A. I don't get it, sir.

Q. The fact that the vessels that you traveled on carried war cargo, who is responsible for the safety of the vessel and the loading of it?

Mr. Long: We make the same objection.

The Court: The objection is overruled.

Mr. Long: An exception, please.

The Court: Exception allowed.

A. The chief mate, sir.

Mr. Long: I move that the answer of the witness be stricken as not material to this case.

The Court: The motion is denied.

Mr. Levinson: You may cross examine.

Cross Examination

By Mr. Franklin:

Q. Mr. Gladis, were you a member of the crew of the Flavel at the time of the incidents occurring to Mr. Lubinski? A. No, sir.

Q. Do you know anything about the condition of the forepeak [48] on that voyage?

A. No, sir.

(Testimony of Nicholas M. Gladis.)

Q. Do you know anything about the condition of the cargo on the vessel on that voyage?

A. No, sir.

Q. Did you know who was in charge of the vessel during the voyage? A. No, sir.

Mr. Franklin: That is all, Mr. Gladis.

Mr. Levinson: That is all.

The Court: You may step down, Mr. Gladis. May this witness be excused? He might have work to do.

Mr. Levinson: Yes, Your Honor; he has a 2 o'clock appointment.

The Court: You are excused permanently, Mr. Gladis.

The Witness: Thank you, Your Honor.

(Witness excused)

WALTER C. LUBINSKI

recalled as a witness on behalf of Libelant, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Mr. Levinson: I will ask that the last question be read.

(Last question and answer read as follows:

“Q. Did you go down into the hold?

“A. Yes, sir. [49]

(Testimony of Walter C. Lubinski.)

“Q. What was your purpose in going down into the hold?

“A. We wanted to discover the source of the fire, because we didn’t know what started it. None of us knew.”)

Q. (By Mr. Levinson): We are talking about the fire on August 15. You understand that, Mr. Lubinski? A. Yes, sir.

Q. What occurred while you were in the hold, Mr. Lubinski, or coming up from the hold?

A. Well, when I started to come up there were various hoses——

Q. (Interposing): Speak up, Mr. Lubinski.

A. I have a bad cold. There were various hoses on the starboard side of the deck, which was the clear side, and various members of the crew were handling it, and as I started to come up one of them hit me in the face.

Q. How was the visibility at the time you were coming up? Could they see you coming up?

A. No. They could see me at times, and at times they could not, because of the down draft, and the wind.

Q. Did they know the location of the ladder?

A. Yes, sir.

Q. Had men gone up and down that ladder before? A. Yes, sir.

Q. What happened when you were struck in the face? You say you were struck in the face by a hose? A. It knocked my mask to one side.

(Testimony of Walter C. Lubinski.)

Q. How long were you then exposed with the mask off? A. About twenty seconds, I guess.

Q. Did you get to the top deck?

A. Yes, sir; I came right up.

Q. At that particular time what was done, or what was ordered with reference to taking out the life boat?

A. When I came up I was all wet, and the skipper was up on the flying bridge, and he told me—we didn't know what was happening down there—he told me to take what men I had available and who were not doing anything, and swing out all the life boats along the rail of the boat deck.

Q. Was that done? A. Yes, sir.

Q. After that incident about August 15, where did the vessel go?

A. We went back to Adak, after about eight or nine days.

Q. During that eight or nine days' period what was the condition of your eye?

A. I was in pretty bad shape then. The doctor was giving me hypos in the arm because the pain was so bad.

Q. Where did the vessel go after you left Adak?

A. We went to Honolulu.

Q. Do you recall the date you arrived in Honolulu? A. No, sir; I do not.

Q. Can you give us approximately how long?

A. I would say approximately in the middle of September, I guess.

(Testimony of Walter C. Lubinski.)

Q. What did you do at Honolulu in connection with any hospitalization?

A. I went to the United States Public Health Service.

Q. Did they examine your eye? [51]

A. This intern looked at it, and then he sent me to an eye specialist.

Q. Did you receive any treatment in Honolulu?

A. He put some drops in my eye, and asked me if I was going back to the States, and I said yes; and he said, "Go back to your ship and go back to the States."

Q. Did you return to your ship?

A. Yes, sir.

Q. Where did the vessel go then?

A. We left Honolulu for Seattle.

Q. Do you recall the date you arrived in Seattle? A. No; I do not.

Q. Approximately.

A. About the 23rd or 24th, maybe something like that.

Q. Of what month? A. September, 1943.

Q. Did your ship pay off in Seattle?

A. Yes, sir.

Q. What did you do immediately following the pay off of the ship?

A. As soon as I could arrange transportation I went home.

Q. Where is your home?

A. My home is in Seattle now, but it was in San Francisco at that time.

(Testimony of Walter C. Lubinski.)

Q. Did I ask you if you are married?

A. Yes. I am.

Q. What did you do when you got to San Francisco?

A. I got hold of my family, and some friends of mine advised me to go to see this doctor in Salt Lake City, which I did immediately. [52]

Q. How long were you in Honolulu?

A. I was there for about three or four days—three or four treatments from this doctor, and he advised me immediately——

Mr. Franklin: (Interposing) Do not tell that.

Q. (By Mr. Levinson): Go ahead.

The Court: Pursuant to his advice, what, if anything, did you do?

Q. (By Mr. Levinson): That is right; pursuant to his advice what did you do?

A. He told me to go right back to San Francisco.

The Court: You cannot say what the doctor told you.

The Witness: To go back to San Francisco.

The Court: You cannot say what the doctor told you. Strike that.

Q. (By Mr. Levinson): What did you do?

A. I came back to San Francisco.

Q. When you got to San Francisco what occurred in connection with your treatment to your eye?

A. I entered the Marine Hospital the same day.

(Testimony of Walter C. Lubinski.)

Q. How long were you in the Marine Hospital for treatment?

A. I was an in-patient for three weeks, and an out-patient for about four months.

Q. During your in-patient treatment what did they do?

A. They gave me various shots in the arm, and a complete general physical check-up, X-ray of lungs, and prostate and massages, and complete test and complete physical check-up.

The Court: What did the doctor in Salt Lake City do?

The Witness: He treated me some and advised me to [53] go back to San Francisco and enter the Marine Hospital.

The Court: What kind of treatment, if any, did he give you?

The Witness: He had me underneath some kind of some kind of machines with an innertube that is hot, and gave me various treatments, and three bottles of different drops to put in my eyes.

The Court: Did he make any blood test of you at all?

The Witness: No, sir. He advised me to get back immediately.

Q. (By Mr. Levinson): Mr. Lubinski, prior to joining the George Flavel what was your general condition of health?

A. I was in perfect health.

Q. Prior to joining that vessel had you ever had any eye examination?

A. Yes, sir.

(Testimony of Walter C. Lubinski.)

Q. How long prior to that?

A. I would say a couple of months, I guess.

Q. Where did you receive that eye examination?

A. The American-President Lines.

Q. At that time what was the condition of your eye?

A. Perfect.

Q. Were you told or advised by anyone at any time that you ever had any trouble with your eyes?

A. No, sir.

Q. Are your parents alive?

A. Yes, sir. My mother is.

Q. Has she ever worn glasses?

A. Not until she was sixty-five years old.

Q. Have you ever been required to wear glasses?

A. No.

Q. Or any member of your family? Have you any brothers and sisters?

A. Yes.

Q. What is their condition of health in relation to eyes?

A. The last time I was home nobody that I knew of wore glasses.

The Court: Where is your home? Where was your childhood home?

The Witness: I was born in Maryland, sir.

The Court: Where do your folks live?

The Witness: My mother lives in Baltimore now, with my sister.

Q. (By Mr. Levinson): At the time of your examination in San Francisco did you get a blood test?

A. Yes, sir.

(Testimony of Walter C. Lubinski.)

Q. Were you advised of its result?

A. Yes.

Q. What was the result? A. Negative.

Q. Since leaving San Francisco what did you do; where did you go after you left San Francisco?

A. You mean after I came out of the hospital?

Q. Yes.

A. I ran for a Union office on an annual ballot, and was elected here in the Seattle Branch as patrolman. And I talked to the doctor in the United States Marine Hospital in San Francisco about that, and I asked him about my further treatment—which I was never discharged—and he told me, “Well, you can enter the hospital here [55] for out-patient treatment.”

Q. When did you come back to Seattle?

A. It will be a year this coming February—next month.

Q. What did you go to work to do?

A. I was patrolman for the Sailors' Union, which I still am.

Q. Have you had another election?

A. Yes.

Q. Are you going to be the patrolman any more? A. No, sir.

Q. That is a shore-side job? A. Yes, sir.

Q. How much does it pay?

A. \$70 a week.

Q. Mr. Lubinski, what were your earnings

(Testimony of Walter C. Lubinski.)
aboard the—I am offering Libelant's Exhibit No. 1 in evidence.

Mr. Franklin: No objection, Your Honor.

The Court: It may be admitted.

(Document received in evidence as Libelant's Exhibit No. 1.)

LIBELANT'S EXHIBIT NO. 1

Mailed to: Walter C. Lubinski, 1602 Northern Life Tower, Seattle, Washington.

ABSTRACT FROM CLINICAL RECORD

March 15, 1944

Name Lubinski, Walter C. Occupation MS

Age 26 years, Last Vessel SS "George Flavel"

Furnished hospital care from October 18, 1943, to November 5, 1943

Furnished outpatient care from October 16, 1943, to February 9, 1944

Diagnosis Iritis, chronic, left eye

CONDITION OF PATIENT UPON ADMISSION

Patient is well developed and well nourished white male, not appearing to be acutely ill. Physical Examination: Eyes; left, pupil enlarged and irregular, iris discolored, suggestion of circumcorneal injection, corneal nebula on left. The remainder of physical examination is essentially negative.

(Testimony of Walter C. Lubinski.)

CONDITION OF PATIENT ON NOVEMBER
5, 1943

Patient discharged with no further hospitalization necessary. He had iritis of left eye which was improved by local treatment and typhoid therapy. Patient is discharged to out-patient department. Given Atropine 1% to use t.i.d.

February 9, 1944: Condition good.

By direction of the Medical Officer in Charge.

[Seal] I. W. STEELE

Senior Surgeon Executive
Officer

U. S. Marine Hospital
San Francisco, California

Copy Received Mar. 18, 1944. Sam L. Levinson.

Q. (By Mr. Levinson): What were your earnings aboard the George Flavel, approximately?

A. For the voyage?

Q. All right; give it to us for the voyage.

A. Well, about \$1300 or \$1400.

Q. How long was the voyage?

A. Around three and one-half months.

Q. You mean \$1450?

A. I think it was around three and a half; I am not sure.

Q. You joined on the 23rd of June, and you left—— [56]

A. (Interposing): September 28—about three months and five days.

(Testimony of Walter C. Lubinski.)

The Court: \$1450?

The Witness: Yes, sir; something around that.

The Court: In three months?

The Witness: Yes, sir.

Q. (By Mr. Levinson): From June 23 to September 28? A. Yes, sir.

The Court: Was that this year?

The Witness: 1943, sir.

The Court: As a boatswain?

The Witness: As boatswain; yes, sir.

Q. (By Mr. Levinson): Mr. Lubinski, since leaving San Francisco, how has your eye been?

A. Well, it was behaving very nicely during the summer.

Q. How do you mean, behaving nicely?

A. Well, it was not bothering me.

Q. Less pain, you mean? A. Yes.

Q. Could you see out of it at all?

A. No, sir.

Q. How does it feel in the wintertime?

A. Just about the middle of November, when we got a little bad weather, my eye got very bad.

Q. In what way?

A. It got very badly inflamed and started to ache.

Q. I see you are wearing a patch.

A. Yes, sir.

Q. When did you put the patch on?

A. By the advice of the doctor at the Marine Hospital, Dr. [57] Mossman, the head doctor, the medical officer in charge of the Marine Hospital.

(Testimony of Walter C. Lubinski.)

Q. Have you been wearing that patch since?

A. Yes, sir.

Q. Were you ever examined for your eyes prior to the examination you have referred to by the American-President Line?

A. Yes, sir.

Q. By what line?

A. The Moore-McCormick Steamship Company.

Q. Do you recall about when that was?

A. 1942, I think—1941 or 1942.

Q. What was the finding then with reference to your eyes?

A. My eyes were all right.

Q. I do not know whether it was brought out on your examination, but had you seen the boxes containing the smoke bombs in the forepeak?

A. Yes, sir; I seen them in the forepeak.

Q. Had you ever seen the particular box or particular smoke bomb, that you know of?—had you ever seen the one that caused the fire, that you know of?

A. You mean after?

Q. Before.

A. I could never identify that.

Q. Where were the boxes stowed in the forepeak?

A. Some were in the carpenter shop, and some in the entrance to the carpenter shop.

Q. Did you ever have any discussion with the mate about that?

A. Yes.

Q. What was your discussion with the mate?

A. I objected to them being stowed there.

Q. When was this?

A. Just before we arrived in Attu.

(Testimony of Walter C. Lubinski.)

Q. What was his reply?

A. He said, "That is where they are going to be," and naturally he is my senior officer, and I couldn't do anything about it.

Q. Since you returned to Seattle were you examined by any other doctor, other than the doctors at the Marine Hospital? I am speaking of examinations.

A. Yes, sir.

Q. Who examined you?

A. I was examined by Dr. Purman Dorman a couple of times.

Q. And you were also examined by some doctor on behalf of Mr. Long's office?

A. Yes; by two doctors. And also given a blood test by Mr. Long's doctors.

Mr. Levinson: If Your Honor will permit me, I will review my notes, but I think that is all.

The Court: Has Libelant's Exhibit No. 2 been marked for identification?

Mr. Levinson: No, but we will have it marked, Your Honor.

The Court: Let opposing counsel see it.

(Document examined by opposing counsel.)

(Document marked for identification Libelant's Exhibit No. 2.)

Q. (By Mr. Levinson): Mr. Lubinski, I hand you what has been marked for identification as Libelant's Exhibit No. 2. It bears as its imprint the official seal of the United [59] States Coast Guard.

A. Yes, sir.

(Testimony of Walter C. Lubinski.)

Mr. Levinson: I am offering Libelant's Exhibit No. 2 in evidence, Your Honor, bearing the official imprint of the Government.

Mr. Franklin: If the Court please, the Respondents object to the introduction in evidence of this exhibit upon three grounds. In the first place, the regulations show on their face they were promulgated as of October 4, 1943. The incident alleged to constitute negligence in this case occurred July 15, 1943 and August 15, 1943, so obviously this document has no relation or bearing thereon.

Secondly, there is no evidence that the smoke distress bomb is a pyrotechnic. A pyrotechnic, if I understand the definition of the word, is a creation that generates fire. The evidence in this case so far before Your Honor is that the only thing that was generated here was the fumes—orange smoke, if you call it such, and certainly not fire.

And thirdly we object to the introduction of this document for the obvious reason that it can have no application, since the navigation of this vessel, which was a Liberty, was under the sole and exclusive jurisdiction of the United States Army.

The Court: If Counsel wishes he can inquire of the witness concerning whether this provision that he deems material in this case was in effect on the date of, or any other date material to this lawsuit.

Mr. Levinson: I was going to ask that question.

The Court: Has the witness read that provision? [60]

The Witness: Yes, sir.

(Testimony of Walter C. Lubinski.)

Mr. Levinson: I will read it to Your Honor.

The Court: It is not in evidence.

Mr. Levinson: Very well, Your Honor.

Q. (By Mr. Levinson): Mr. Lubinski, I show you what has been marked for identification as Libelant's Exhibit No. 2, and I will direct your attention to Section 146, 29-44, on Pages 30 and 31. I will ask you to read that, and I will ask you, without telling what it is, whether that provision was in effect, or a provision containing the same requirements, at the time this vessel was loaded, to your knowledge.

Mr. Long: I do not think, Your Honor, that is the proper way to prove a Governmental regulation, to ask some witness about it who is not shown to know anything about it whatever. We object to it.

The Court: The objection is overruled.

Q. (By Mr. Levinson): The question is, was the substance of that provision in effect at the time the George Flavel was loaded in San Francisco?

A. I am pretty sure it was; yes, sir.

Mr. Levinson: I am offering that portion of it in evidence, and I would like to offer the document itself, but if Your Honor feels I should read it, I will be glad to read that section in evidence. I prefer to offer the document.

The Court: Do you have any objection?

Mr. Franklin: Yes. We renew our objections already made on all grounds; namely, in the first place, improper proof of an existing regulation of

(Testimony of Walter C. Lubinski.)

the Government by the [61] statement of a witness, as not being the proper method of proof; secondly, that there is no evidence in the record that the smoke distress bomb was a pyrotechnic, or embraced within the terms of the purported provision No. 3, upon the ground that the provision is obviously immaterial to a situation such as existed on the George Flavel, which was under the exclusive jurisdiction of the United States Army at the time of the incident.

The Court: The last objection is overruled. The objection made on the ground that the material here in question was not pyrotechnic is overruled, because I think the word "pyrotechnic" includes inflammable materials that produce smoke or flames, which in themselves may not be a fire communicator.

For instance, like many of the substances used on gala occasions for display purposes, they include materials that throw out an illumination that looks like a flame, but which is not a flame at all. That kind of material is included in the definition of "pyrotechnic."

The objection that it is not properly proved, I will hear from Counsel for the Libelant on that.

Mr. Levinson: Your Honor will recall that I am not endeavoring to introduce this regulation as the particular regulation in effect at that time. I only identified it by asking if a similar regulation was in effect. I have no way of knowing whether it was actually modified, but I can establish by this

(Testimony of Walter C. Lubinski.)

witness, if I so desire, that the Steamboat Inspection Service has been enforcing such similar regulations, and that it is simply a modification and good practice. I am not contending [62] that that particular regulation in its written form there was in effect. My question to the witness was not in that form.

The Court: Do you not suppose it is possible for some witness, some local witness, to state under oath how this is circulated, by what authority, if any, of the Government, and what use, if any, is made of it?

Mr. Levinson: This witness can establish that, I believe. I will be glad to develop it, if Your Honor desires.

Q. (By Levinson): Mr. Lubinski, referring to what has been marked for identification as Libellant's Exhibit No. 2, who delivers those to you, or to whom are they delivered?

A. They are delivered to our office by the United States Coast Guard, to familiarize our men with them.

Q. Your office of the Union?

A. The Sailors' Union of the Pacific. They are sent by mail by the United States Government.

Q. Are your men involved in the loading of these ships? A. Yes, sir.

Mr. Levinson: Your Honor will note I am not introducing the regulation is being in effect, but establishing by that the identify of one that was in effect at the time of the loading of the vessel. Re-

(Testimony of Walter C. Lubinski.)

cently they have all been codified, and this witness has already established that has been the practice.

Mr. Long: We object to that, Your Honor, because obviously if there is any such regulation we have the Coast Guard officers here, and we have the Steamboat Inspection [63] Service officers here, and they can be called and examined and cross examined on the regulations.

The Court: I will sustain this objection without prejudice to the right of the Libelant to produce competent testimony as to the authenticity of this regulation which is involved in Libelant's Exhibit No. 2 for identification.

Mr. Levinson: You mean its authenticity as of the date of the fire?

The Court: Yes.

Mr. Levinson: You are not questioning it now on the ground——

The Court: Well, I am sustaining the objection for the present on that ground.

Mr. Levinson: Very well, Your Honor. I will attempt to remove that objection.

The Court: You may step down, Mr. Lubinski. Court will be adjourned until 2 o'clock this afternoon.

(Whereupon an adjournment was until 2:00 p.m., January 9, 1945.) [64]

Seattle, Washington

January 9, 1945, 2:00 P.M.

(All parties present as before.)

The Court: You may proceed. Libelant's Exhibit No. 3 has been marked for identification.

(Document marked for identification Libelant's Exhibit No. 3.)

Mr. Lubinski may resume the stand.

Mr. Levinson: I have here, Your Honor, proposed Libelant's Exhibit No. 3, which is a copy for official use of the United States Coast Guard, and is entitled "Regulations Governing Transportation of Military Explosives on board Vessels during Present Emergency." It is dated October 1, 1942, and on Page (a) of the document is the authority for the regulation.

Under the rule, as I understand it, such documents bearing the official imprint of the United States Coast Guard have the official designation and authority as such, and I am offering the same in evidence. I am referring to the specific section of the document which covers the particular situation at hand. (Document handed to witness.)

Mr. Franklin: If the Court please, I am not going to quibble and say it is not properly identified because there is no seal of the Coast Guard. I am sure that could be obtained, so I am not raising any objection to the fact that the regulation is offered as it is undoubtedly a valid regulation issued by the Coast Guard as October 1, 1942. [65]

But I am objecting to the introduction in evi-

(Testimony of Walter C. Lubinski.)

dence of that document for the reason that it is incompetent, irrelevant and immaterial, for the following reasons:

The portion which will be used in evidence refers, first of all, only to pyrotechnics, and there is no evidence that this smoke bomb was of a pyrotechnic nature as described in this category.

Secondly, it is issued, as appears upon its face, only for use by the Coast Guard and the Navy, and is, therefore, not binding on the Army, which would be charged with this invasion, of course.

And thirdly, in any event there is no showing up to date that this regulation was in effect as of July 15, 1943 or August 15, 1943, applicable and effective to the flotilla of this invasion.

The Court: Respecting the nature of this material as coming within this regulation, this regulation deals with explosives, does it not?

Mr. Levinson: The regulation itself, Your Honor, defines it, and the definition refers to a smoke bomb, which I pointed out to Counsel. I will be glad to read it to Your Honor.

The Court: Please give Counsel that proposed Exhibit No. 3 for identification.

Mr. Levinson: The following appears under the section headed "Ammunition." It says:

"Ammunition consists of all types of shells, projectiles, grenades, bombs, mines, torpedoes, torpedo warheads, propellant powder charges, pyrotechnics, chemical, smoke or incendiary ammunition, [66] or other devices containing explosives that are util-

(Testimony of Walter C. Lubinski.)

ized by the armed forces in the prosecution of the war.”

That is the definition.

Mr. Franklin: If the Court please, obviously this is merely a smoke distress signal, and it obviously does not come within the category of these defined products, which all have ammunition, or which are to be used as projectiles or supplies for war.

This is a regulation, and a smoke bomb is carried solely for the purpose of distress purposes. It is not ammunition, it is not a bomb, and it is not an explosive in bulk. It is not a military explosive. So this provision is obviously inapplicable to this, and it is not a pyrotechnic.

The Court: That objection is overruled. What is the other one—that it was not proved to be in effect at the time of this occasion?

Mr. Franklin: It is dated October 1, 1942. The only other regulation I have been able to obtain is the one dated October, 1943, which is exactly in the same terms as this one.

The Court: Only superseding it?

Mr. Franklin: Only superseding it. This is the one that covers that period. There has been already introduced in the record a pamphlet dated October 1, 1943, which is word for word with the pamphlet dated October, 1942, and, as a matter of fact, this pamphlet dated October 1, 1942, was originally promulgated in substance in 1939, and has varied from time to time. But these are [67] the ones that are in effect.

(Testimony of Walter C. Lubinski.)

The Court: Do you wish to be heard further, Mr. Franklin?

Mr. Franklin: No, Your Honor.

The Court: The objection is overruled.

Mr. Franklin: Your Honor will allow an exception?

The Court: Exception allowed. Libelant's Exhibit No. 3 for identification is admitted in evidence.

(Pamphlet received in evidence as Libelant's Exhibit No. 3.)

Mr. Levinson: I have also offered in evidence what has been marked Libelant's Exhibit No. 2, which is the one that follows, as evidence to show that there has been no change in the regulation.

The Court: I think there ought to be some further authentication of Exhibit No. 2.

Mr. Levinson: Very well, Your Honor.

The Court: I will not admit it at this time.

Mr. Levinson: Your Honor, may I then read such portions of this exhibit that I think are pertinent?

The Court: You may do so.

Mr. Levinson: Reading from Libelant's Exhibit No. 3, Sub-Section 146.29-44, at Page 11 of the exhibit, under the title "Pyrotechnic Stowage." It reads as follows:

"Pyrotechnic ammunition shall be given ammunition stowage as described in Section 146.29-42, provided, however, such articles shall not be stowed in a compartment in which any other explosives

(Testimony of Walter C. Lubinski.)

(except class I ammunition) is stowed. Pyrotechnics shall [68] not be overstowed with other cargo. The location of this type stowage shall be away from heat and in a dry area so protected as to insure no moisture contacting the packages.

“(b) For limited quantities of pyrotechnic ammunition an alternate stowage may be utilized consisting of stowing in metal lockers or portable magazines so located as to conform with the provisions of (a) as regards other explosives, over-stowage, heat and moisture.”

The reference appears on Page 10, 146.29-42:

“Ammunition Stowage. Ammunition that is authorized to be given ammunition stowage by the provisions of the tables (sec. 146.29-100), shall be stowed in a location selected in accordance with the procedure as set forth in section 146.29-30.”

Mr. Franklin: If the Court please, obviously that is inapplicable to this situation. This is not ammunition.

If I understand Your Honor's ruling, Your Honor holds that this is embraced within the class of pyrotechnics, and if so, it is embraced within the terms of the former paragraph. This is not ammunition. There is no proof to date that it is ammunition.

The Court: The document is in evidence, and you can read any part of it.

Mr. Levinson: The section I referred to, Your Honor, should be studied in accordance with the tables, and the tables are set forth as follows. This

(Testimony of Walter C. Lubinski.)

is Section 146.29-30, on Page 7: "Location of Magazines and [69] Ammunition Stowage."

This is quite long, Your Honor, and if Your Honor will bear with me:

"A cool location being an important factor, magazines shall be built and ammunitions stowed in an authorized location in accordance with the following factors in the order listed.

"(1) A tween-deck hold, preferably a lower tween deck.

"(2) A lower hold.

"(3) In the square of a hatch. If in the square of a weather deck hatch, having wooden hatch covers, a steel plate of not less than 5 pounds weight per square foot, or other approved protection adequately secured in place, shall be fitted over the top side of the wooden hatch covers.

"(4) A shelter deck in a location as far removed from uptakes or engine casing as possible.

"(5) A forecastle, poop, or permanent deck house provided the space is ventilated and does not contain any "In use" crew accommodations, nor vessel stores and can be closed off from traffic while at sea.

"(6) Insulated spaces normally comprising refrigerator spaces may be used for the stowage of all classes of ammunition, provided all regulations relative to stowage of explosives with other dangerous articles of cargo are observed and the spaces may be ventilated sufficiently to provide a temperature consistent with the temperature of other holds

(Testimony of Walter C. Lubinski.)

of the vessel. When such spaces are fully ceiled [70] the entire compartment will be considered as a magazine, however, any pipes within the compartment shall be protected by horizontal cargo battens of a size not less than commercial 2" x 4", spaced not more than 12" apart, center to center and secured to 4" x 6" uprights spaced not more than 36" apart. Refrigerator spaces, the floors of which are lined with lead, shall not be used as a stowage for picric acid in bulk.

"(7) Explosives in bulk and classes VIII, X, and XI ammunition shall not be stowed immediately below the principal bridge. At least one compartment of normal deck height shall intervene between the bridge and the stowage of such explosives in bulk.

"(8) Explosives in bulk shall not be stowed in a compartment immediately below or adjacent to crew accommodations.

"(9) Classes VIII, X, or XI ammunition shall not be stowed in a compartment immediately below or adjacent to crew accommodations."

The only other sections marked are the sections I have heretofore read to Your Honor, which defines ammunition as including smoke bombs.

The Court: Does that complete the direct examination?

Mr. Levinson: That completes the exhibit, Your Honor.

The Court: Does that complete the direct examination? [71]

(Testimony of Walter C. Lubinski.)

Mr. Levinson: And that completes the direct examination.

Cross Examination

By Mr. Franklin:

Q. Mr. Lubinski, at the time you joined the Flavel in San Francisco, did you know you were going to participate in the Kiska invasion?

A. No, sir.

Q. Nobody, knew, did they? A. No, sir.

Q. As boatswain who issues you orders during the operation of the vessel?

A. The chief mate.

Q. Or if he is not on watch, who issues them then?

A. Nobody. The custom is he usually leaves enough orders to cover the day.

Q. He is the only individual you look to for your orders? A. That is right.

Q. How many Army transport officers assigned to the loading and discharging of cargo were on board the vessel from the time you left San Francisco until you reached Honolulu?

A. Two, sir.

Q. Do you recall their names?

A. No, sir; I do not.

Q. Was one of them Lieut. Hill?

A. That is right.

Q. And Lieut. Hearst? A. That is right.

Q. And they were in charge, were they not, of the stowage of the cargo when it was loaded in San Francisco? A. Not to my knowledge.

(Testimony of Walter C. Lubinski.)

Q. You would not know, would you?

A. No, sir.

Q. Did you see those two officers at Kiska and Attu, supervising the loading and discharging of cargo and supplies from the vessel?

A. Well, yes and no.

Q. Did you see them at Attu in that capacity?

A. At certain times; yes, sir.

Q. Did you see them at Kiska exercising the same authority, or performing that work?

A. At different intervals, yes, sir.

Q. Do you not know, of course, what instructions they gave the chief mate? A. I do not.

Q. When the vessel left San Francisco was it loaded to capacity?

A. Well, she was a troop carrier, and they put as much cargo as they possibly could in her.

Q. They not only put as much cargo as they could on her, but they carried as many troops as they could possibly squeeze in, didn't they?

A. As much as they had facilities for, sir.

Q. Didn't they carry troops beyond their facilities, and weren't they sleeping under the hatches?

A. Well, that was after we got up North.

Q. You mean after you got to Attu? [73]

A. After we left Attu, sir.

Q. But every conceivable space for cargo on the vessel was used when you left San Francisco, wasn't it? A. Yes.

(Testimony of Walter C. Lubinski.)

Q. As a matter of fact, you had deck cargo, your decks just stowed and littered with invasion cargo.

A. No, sir. We had only eight invasion barges.

Q. How large are those invasion barges?

A. Well, forward, sir, they were, I think, forty feet long, and we had four aft that were twenty feet long.

Q. And how wide?

A. About twenty by four, sir.

Q. You do not mean four feet?

A. Twenty by five would be more proper.

Q. About five feet wide?

A. About five or six feet, the smaller ones back aft.

Q. You used up all the available deck space?

A. We had two on the hatch and two in each wing.

Q. Was there any other cargo lying on the deck of the vessel when you left San Francisco for Attu, other than these landing barges?

A. We had a few boxes of K rations.

Q. As a matter of fact, all the equipment for the amphibious unit was stowed forward, wasn't it, on the deck?

A. It was stowed forward, all covered up with canvas.

Q. And that equipment consisted of what?

A. I don't know that, sir. That was covered.

Q. You saw that after it was stowed down in the forepeak, didn't you?

A. I saw some of it, yes. [74]

(Testimony of Walter C. Lubinski.)

Q. You know there was guns there, don't you?

A. I do, sir, yes.

Q. And you know that there were these smoke distress bombs? A. Yes, sir.

Q. And you know there were the food rafts?

A. Yes, sir.

Q. And those had all been laying on the deck exposed to the elements before they were stowed in the forepeak? A. Yes, sir.

Q. They were deteriorating there, weren't they, by exposure to the elements?

A. Not to my knowledge they were not.

Q. Mr. Lubinski, what was the approximate number of the amphibious unit aboard the vessel?

A. About fifteen or twenty, sir, I think.

Q. They were under the charge of their ensign?

A. Yes, sir.

Q. Do you know when their gear or ammunition and supplies was stowed in the forepeak?

A. I do not, sir.

Q. Did you receive orders from the mate to stow it in the forepeak? A. I did not.

Q. Who else would stow that in the forepeak, except the sailors?

A. Probably the chief mate.

Q. Would the chief mate carry down all that equipment himself, without any assistance from the sailors?

A. He probably got assistance from the amphibious crew. I don't know, sir. [75]

(Testimony of Walter C. Lubinski.)

Q When was it you first noticed this equipment of the amphibious unit in the forepeak of the vessel?

A. Well, it was about five or six days at sea, when I took some men down in the forepeak. We were going to make some slings for the heavy caterpillars.

The Court: When you use the word "equipment," what do you mean?

Mr. Franklin: By "equipment," if the Court please, I mean the guns they had, the smoke signals, and the food supplies, which were all part of the landing equipment of these barges which were being carried.

Mr. Levinson: If the Court please, I do not believe the witness had finished his answer.

The Court: You may finish your answer.

The Witness: We went down in the forepeak. I went down there myself with a few sailors to make some wire slings for these caterpillars. We didn't have much gear aboard. The gear the Army gave us was inadequate for that work.

Mr. Franklin: We move that the answer be stricken as not responsive. Will you read the question, please?

The Court: I would like to remind the witness that all the way through he is giving the Court the impression that you often answer questions not put to you, and I wish you would keep in mind the necessity of avoiding that. Do not give the Court that impression. Try to answer only the questions put to you, and leave other subjects to be inquired

(Testimony of Walter C. Lubinski.)

into by counsel. Counsel on both sides are very able and experienced lawyers.

The Witness: Yes, sir. [76]

The Court: And you can leave it to them to bring out the facts which they think are helpful to the Court in making a right and just decision upon your case.

Mr. Franklin: I will rephrase the question, Mr. Levinson.

Q. (By Mr. Franklin): When was it, Mr. Lubinski, that you first learned that the distress bombs of the amphibious unit had been stowed in the forepeak?

A. After we were at sea about five or six days.

Q. Out of San Francisco? A. Yes, sir.

Q. The forepeak of the Flavel is located, you said, in the extreme forward part of the vessel?

A. That is right, sir.

Q. And to gain access to the forepeak you descend a wooden ladder to the deck of the forepeak?

A. A steel ladder, sir.

Q. And then on either side of the forepeak of the Flavel, on the occasion of your trip, there were shelves running along the side of the vessel on both the port and starboard sides?

A. No, sir.

Q. Were there any shelves on either side?

A. The port side, two shelves, sir.

Q. What was on the starboard side of the vessel?

A. There were no shelves at all. We had a bunch of gear stowed over there.

(Testimony of Walter C. Lubinski.)

Q. To give the Court a rough idea of this forepeak, as you descended the ladder and turned aft, how far back would the forepeak extend? [77]

A. Around fifteen feet, sir.

Q. And then right in the center of the top deck of the forepeak was a booby hatch leading to a lower hatch?

A. Yes, sir.

Q. Where you mention the carpenter's shop in this forepeak, will you explain where that was?

A. That is on the after end of the forepeak?

Q. On what side?

A. It runs right straight through, athwartships.

Q. Does it run transversely?

A. Athwartships.

Q. Is it separated from the forepeak?

A. Yes.

Q. Or is it just the after bulkhead of the forepeak?

A. It is just the after bulkhead of the forepeak, is all it is.

Q. You do not have any doors?

A. Yes, there is a door there.

Q. What does that open into?

A. That opens into the carpenter shop, from the forepeak into the carpenter shop. It is only separated by a bulkhead, and they call it a carpenter shop.

Q. Then the carpenter shop is a separate compartment from the forepeak itself, separated by a bulkhead?

A. Yes, sir.

(Testimony of Walter C. Lubinski.)

Q. Mr. Lubinski, where were these bombs stowed?

A. Some were in the shop and some were in the forepeak.

Q. Did you observe how the bombs were packed, whether they were in individual cartons, or in boxes of several cartons?

A. To the best of my knowledge, I think there were four in [78] a carton, sir.

Q. And those four distress signals were in a cardboard carton, were they?

A. I don't remember that. I couldn't answer that.

Q. What were they held in; was it a cardboard container or a fibre board container?

A. I really don't know, sir.

Q. Didn't I understand you to say there were four in a box?

A. Four in a box. There is some kind of a container, but I don't know whether it was fibre or paper or wood. That is what I mean.

Q. They were in a completely enclosed box?

A. Yes; supposed to be.

Q. How many of those boxes did you notice, first, in the carpenter shop?

A. I couldn't answer that, sir.

Q. How many of those containers of four smoke bombs each did you notice in the forepeak?

A. Around six or so.

Q. You mean six containers of four each?

A. Yes, sir.

(Testimony of Walter C. Lubinski.)

Q. Mr. Lubinski, wasn't there only one distress signal for each one of the eight landing barges?

A. I don't know that, sir.

Q. As a matter of fact, you haven't any very clear recollection of the number or location of those smoke distress signals at this time, have you?

A. I haven't any recollection of the number.

Q. You do not know how many were stowed in the carpenter shop, nor how many were on the port side of the forepeak? [79]

A. No, sir; I do not.

Q. Who had access to the forepeak?

A. The chief officer and myself; and the sailors and the rest of the mates.

Q. Did the amphibious unit, consisting of the ensign, and I think you said twenty members——

A. (Interposing): Somewhere—I don't know exactly.

Q. Did they have access to that forepeak too?

A. After around five or six days, I should say, they were fixing their guns.

Q. As a matter of fact, didn't the amphibious unit work down in the forepeak night and day after they were beginning to go down there, repairing their guns and adjusting their gear, and getting ready for the landing?

A. No. This was long before the landing.

Q. Isn't it a fact that they did work down there in the forepeak after you left San Francisco, and on the way up to Attu?

A. Adak, sir.

Q. Up to Adak?

A. Yes, sir.

(Testimony of Walter C. Lubinski.)

Q. And isn't it a fact that the amphibious unit was working in the forepeak on their ammunition and equipment at the time the smoke distress bomb escaped at Attu on July 15, 1943? A. No, sir.

Q. When was the last time you had seen any member of the amphibious unit working down in the forepeak before the incident at Attu on July 15, 1943?

A. To the best of my knowledge, I think they finished up [80] about two days after we were in Adak.

Q. And that would be how many days before you got to Attu? A. Two weeks.

Q. Mr. Lubinski, these smoke distress signals, you said were in a container like gallon can, roughly? A. Yes, sir.

Q. I mean after it was removed from the carton or container it resembled a gallon can?

A. Yes, sir.

Q. And they had a plug or screw cap in the top, inserted in the top of the container?

A. Yes, sir.

Q. And it was necessary to break open or to unscrew the cap of the smoke bomb or distress signal in order to release its contents?

A. I don't know that, sir.

Mr. Levinson: Your Honor, may I interrupt?

The Court: Yes.

Mr. Levinson: Dr. Dorman is here, and if it would be convenient to Counsel, I would like to put him on.

(Testimony of Walter C. Lubinski.)

The Court: The Doctor may be accommodated.
You may step down, Mr. Lubinski.

(Witness temporarily excused.) [81]

DR. PURMAN DORMAN,

called as a witness on behalf of Libellant, being first
duly sworn, testified as follows:

Direct Examination

By Mr. Levinson:

Q. Will you state your name, please?

A. Purman Dorman.

Q. You are a duly licensed and practicing physician and surgeon in the State of Washington?

A. Yes, sir.

Q. How long have you been such licensed physician and surgeon in this State?

A. About twenty years.

Q. Dr. Dorman, are you now specializing in any particular practice?

A. I do only eye, ear, nose and throat.

Q. How long have you been specializing in that practice?

A. About fifteen years.

Q. Dr. Dorman, are you a member of any society that specializes in or is limited to a group of practitioners of the eye?

A. I am not a member of any society. I have been certificated by a Board whose members are eye specialists only, such a group known as the American Board of Ophthalmology.

(Testimony of Dr. Purman Dorman.)

Q. Are the members of that Board selected on some basis of proficiency in connection with the eye?

A. Those people who are examined are first passed upon by this Board to determine if their qualifications are satisfactory. They are then given a couple of examinations, [82] and references are had and inquiries are made to determine their type of standing in the community.

Q. Are there any other members of that Board in the city of Seattle at the present time?

A. Yes, upon this Board, a number. There are probably about twelve or fifteen.

Q. Will you tell the Court something of the specialized training that you have taken in connection with your profession?

A. A number of years ago I completed my specialized training in New York, followed by a short course in Vienna, and, of course, various short bits of instruction at various times in the intervening years between then and now.

Q. Are you a member or are you on the board of any national program in connection with the eyes?

A. Yes. I am the eye physician for a new Federal program termed the Vocational Rehabilitation Program, and as such I am the only eye physician in the United States upon such a program. It is a widespread program which is just beginning to get under way, and will probably derive some attention within the coming year.

(Testimony of Dr. Purman Dorman.)

Q. Have you been called to Washington in connection with that?

A. As such I was called in committee—I was going to say with other professors, but with other men, most of whom are professors in various fields, medicine, surgery, psychiatry, hospital demonstrators, nurses, and I was the eye physician upon that committee, the only eye physician. [83]

Q. Are you also a member of any other national Board in connection with blindness or treatment of the eye?

A. Yes; I have been a member of the National Society for the Prevention of Blindness for a number of years. I am the Western representative, I believe, upon such committee.

Q. Is there anything else you want to tell us about your qualifications?

A. No; that is enough. That is ample.

Q. Dr. Dorman, at my request did you examine Mr. Lubinski? A. I did.

Q. You may refer to your notes and tell me when you made the examination, what you found, and the history given you at that time.

A. I had the opportunity of examining Mr. Lubinski on or about March 29, 1944, for the first time, and at that time he gave me a long history, indicating that some time during the month of July—probably about July 10 of 1943, while he was aiding in unloading material from a hold in a ship, while smoke was pouring from the fore hatch. Mr. Lubinski realized there was something wrong and

(Testimony of Dr. Purman Dorman.)

descended into this hatch to find out what was wrong.

At that time he found a distress smoke bomb. It was necessary to make several trips into the hold to find the smoke bomb, but he was unable to find it at first, and then he was successful. He carried the hot bomb outside, carrying this bomb by means of a heavy pair of gloves. The time of this accident was about 10:00 or 10:30 in the evening.

Shortly after that incident he returned to his quarters, but about 4:00 the next morning, approximately six or seven hours after the time of the original injury, he awakened to find that both eyes, both lids of both eyes, were badly swollen.

At that time he was treated by an Army doctor, a Captain, who advised hot applications, and prescribed some form of ointment. The right eye apparently cleared up—because both were involved at the time—and returned to normal after a few days' interval, but the left eye continued to be red, inflamed, and had an excess of tears.

There was apparently some loss of vision in the left eye, and a spot was noted in his direct line of vision.

During that time under discussion he received treatment for both eyes from the Army doctor, who was stationed on the ship.

On or about August 15, 1943, while unloading a snow jeep, the gas exhaust from the motor of that jeep backfired, causing a fire to the surrounding material, within what is termed the No. 3 hold.

(Testimony of Dr. Purman Dorman.)

To put out that fire several hoses were lowered into the hold, and in line of his duty Mr. Lubinski, again using an ordinary type of gas mask, went into the hold to find the cause of the fire, being accompanied on this occasion by several other men.

During that time one of the streams of water from the hose struck him in the head, knocking his mask from his face, and allowing the fumes to find access within the mask. [85]

Within a few minutes the fire was found, but after that calendar date the left eye began to swell more than it had done so in the preceding days.

Some two weeks after that second affair, and still while he was receiving treatment from the doctor on board the ship, he consulted a doctor at Adak. That doctor advised him that because of his short stay in that particular port—further treatment should be given, but he was unable to give it—and that doctor advised him to wait until his next port of call, Honolulu, sometime around the 10th or 15th—

Mr. Franklin: Doctor, have you any independent recollection of this case at all?

The Witness: Oh, yes; I saw this man yesterday and discussed it.

Mr. Franklin: I notice you are reading from your notes.

The Witness: Not quite verbatim, Mr. Franklin. My notes contain additional to this. This is not verbatim from my notes. I am sorry. I do

(Testimony of Dr. Purman Dorman.)

not remember all the details, because I have seen a number of other cases.

Sometime about the 10th or 15th of September he consulted the Public Health Service in Honolulu. After discussion with the Department of Public Health he was advised to wait for further treatment for the left eye until his return to the United States. At that time the left eye still continued to cause pain.

Instead of arriving at San Francisco, where they [86] had anticipated, the boat arrived in Seattle on or about September 28, 1943. When he was paid off he did not go to the Public Health, but instead went home, and stayed home twenty-four hours, and then went to Salt Lake to consult a doctor there, Dr. Fairbanks. He was under the care of Dr. Fairbanks at Salt Lake for four or five days. Fairbanks advised him to return to the Public Health in San Francisco for continued treatment.

After that advice, and some time on or about October 4th he was taken as an in patient to the United States Marine Hospital at San Francisco. He was treated at the hospital three weeks, received various sorts of tests, and was then treated as an out patient until about February 15, 1944.

He returned to Seattle and was denied treatment at the Marine Hospital at Seattle because he had not been an active seaman for that period from September to October—or to October, and had not received any treatment for his left eye since his

(Testimony of Dr. Purman Dorman.)

departure from San Francisco. I saw him first in March of 1944.

Q. When you saw him, Doctor, what did you find? Give us your physical findings.

A. I asked him what sort of trouble he was having with his eyes. He stated that he had no pain within the left eye, but the vision was limited to a light perception only.

Now, light perception means only the acknowledgment of whether a light is on or off. It is the very first step of complete and total blindness. [87]

Q. Could you give us the nature of your examination of the eye, Doctor?

A. We endeavored to find out how hard the eye was, and decided by means of a machine called a tonometer. That tonometer is a device whereby you place it on the surface of the eyeball, measure its amount of deviation, and compare it with the normal.

In his particular case the tension was about 40 millimeters of mercury. Normal should be around 25 or 28, somewhere in there. So that indicated his eye was a little harder.

The tension in the right eye was found to be about normal, namely, 25 millimeters. The fundus of the right eye, its retina and structure, were found to be all right. But within the left we couldn't see anything, because there were a number of changes in what we term the anterior chamber, or the anterior segment of the eye.

(Testimony of Dr. Purman Dorman.)

The eye is divided into two portions, the anterior and the posterior segments. The anterior segment constitutes that area including the cornea, the fluid directly behind the cornea, called the aqueous, the iris and the lens.

The posterior chamber consists of the remainder. In order to see the posterior chamber the anterior chamber must be fairly clear. So it is not possible to say what was present in the posterior chamber, so there was no way of determining what was in there, because the anterior chamber had so many things wrong with it. [88]

There was, for example, what is termed as a swelling of the lining membrane of the cornea.

The cornea is divided into two portions, the front part, outside, that part exposed to the air, the epithelium. Then there is a posterior surface of the cornea covered by endothelium, and it is upon examination of the endothelium that we can determine what may be wrong with the eye, because there was a swelling of the lining membrane of the posterior surface of the cornea. It had what is termed a bedewing, and a bedewing is a swelling or edema of the membrane.

I purposely stress some of these technical points, because it is only by attention to their final and inner structures can you make diagnoses as to the chronicity and the future of a condition. That swollen condition indicated an increase of tension within the eye.

The iris was bulging forward, somewhat like the

(Testimony of Dr. Purman Dorman.)

hillocks in the low foothills of the Cascades. The iris could be seen to be rounded forward, bound down in certain places, like the crevices, or like the valleys between hillocks—bound down by the plastic exudate, whereas the hillocks were caused by the aqueous or fluid that had formed behind the iris.

Such a condition is found only in a severe type of iritis, the devastating, destructive type of iritis.

Due to the adhesions of the iris to the underlying lens, the nutrition of the lens had undergone—the lens itself had undergone some changes, due to a change in its nutrition. The lens was opaque, such is a frequent accompaniment of a severe uveitis.

Q. That eye, as you found it, what, in your opinion at that time was its visibility to serve as an organ of sight?

A. It was useless as an organ of sight, because its vision was limited, virtually, to light perception, which is of no value.

Q. Doctor, the eye as you saw it at that time, what is your opinion as to whether that condition is permanent or not?

A. Without question that condition is and was permanent.

Q. Doctor, before going into the question of causation, what would the prognosis of such a condition be with relation to the possible danger to the good eye, the right eye?

A. It is difficult to prognosticate concerning the future of another eye by the presence of a condition within one. All eyes do not act the same, but

(Testimony of Dr. Purman Dorman.)

upon experience we may guess that the chances are that the left eye—that it might become involved as a secondary ophthalmitis.

Mr. Franklin: You mean the right eye, don't you?

The Witness: The right eye; that is correct. It might possibly, and it might possibly not. The right eye might possibly not be damaged at all, but the chances of the left eye are, of course, known, because the left eye is valueless.

Q. (By Mr. Levinson) In that case the condition as you found it at that time, and as you found it on your examination yesterday, is there any accompaniment of pain, particularly in connection with weather changes, or exposure, or anything of that nature?

Mr. Franklin: In what eye? [90]

Mr. Levinson: In the left eye—or the right eye—either. All eyes are not the same.

The Witness: There may or may not be any pain within the left eye. What is true of one person is not always with the next. So I could only hazard a guess. There may or there may not be any pain.

Q. (By Mr. Levinson) In your examination yesterday, was there any change in the condition of the eye from your first examination, made in March of 1944?

A. Yes. The left eye had a few changes. The iris is becoming more thin and atrophic, or weakened, by lack of use. Those were the main

(Testimony of Dr. Purman Dorman.)

changes. The tension was about the same—slightly increased over what it was at a pervious date. The iris was slightly bulging more forward, but apparently is had not involved the left eye, in that 18 or 20—let us see—in that eight or nine months' interval. It is always possible that it might involve it at a later time, but as of yesterday it doesn't cause any damage to the right eye.

Q. I notice he is now wearing a patch over his eye, with the advice—or he testified—because it seemed to be more affected by cold, that is, the winter months affecting it, and causing some irritation. Is that a common thing in an eye?

A. That is very common. As a matter of fact, simply the use of the right eye for his reading, by the strain placed upon it, may cause an inflammation in the left eye, which always seems strange to the person who owns it, but not strange to the person who has seen very many of such similar things. Cold also may cause much the [91] same thing—namely, temperature changes,—usually a cold, may cause a spasm of the vessels, and a pain which may retreat to that side of the head.

Q. Is that the reason the patch is worn?

A. Well, that is probably the reason why. You have to determine by experience, and the previous doctors who have had him under observation have so advised, and undoubtedly they have had a long time to see it.

Q. You took this man's personal history?

A. Yes.

(Testimony of Dr. Purman Dorman.)

Q. From that personal history, and from the investigation and examination that you made, can you give us now your opinion as to the cause of the condition which you found at the time of your first examination, and the condition which existed yesterday?

May I add one thing before you answer the question, Doctor: there has been testimony here that the Libelant, Mr. Lubinski, was examined for his eyes several months before he joined the vessel, and at that time they were found good, he passed the eye examination for both eyes; he had another similar examination about a year prior to that time with the same result, and his own personal history is that he never had any trouble with his eyes prior to that time, and, as far as he knew, they were all right and gave him no difficulty, and there was no history in his family of eye weaknesses or difficulties with the eye. With those additional facts, Doctorfi can you then give us your opinion as to the cause of the condition which you found on your first examination?

Mr. Franklin: If I understand you, Doctor, you are [92] testifying that you found him suffering from iritis?

The Witness: That is correct.

Mr. Franklin: And as the result of your examination what did you find?

The Witness: As the result of my examination, and the taking of the history of the case, and in consideration that he had not had any eye difficulty

(Testimony of Dr. Purman Dorman.)

previous to the date of July, 1943, I came to the conclusion that that injury that he had received to his eye was amply sufficient cause for the eye condition as I found it.

Q. (By Mr. Levinson) Doctor, in your profession is it sometimes found that there is a systemic condition which may cause a similar condition to that which you found in Mr. Lubinski—is that true?

A. Yes; there may be systemic conditions.

Q. If there is such a systemic condition, how will it affect the sight of one eye compared to the other, or would it affect both eyes equally?

Mr. Franklin: You mean in iritis, or generally?

Mr. Levinson: You may cross examine later.

Mr. Franklin: I think it is only fair to advise the doctor what condition you are talking about.

The Court: The objection is overruled.

Q. (By Mr. Levinson) You may answer, Doctor.

A. I think it only fair in the discussion of this to limit our discussions more or less to what is present as to iritis or uveitis; and in general if an endogenous cause is responsible for the iritis, such endogenous cause being systemic, often such endogenous infection or trauma cause an involvement of both eyes. If it involves one [93] eye first—for it may do so—frequently the other eye is also involved, usually after but a short lapse of time between.

Q. The fact that in this instance you examined

(Testimony of Dr. Purman Dorman.)

Q. From that personal history, and from the investigation and examination that you made, can you give us now your opinion as to the cause of the condition which you found at the time of your first examination, and the condition which existed yesterday?

May I add one thing before you answer the question, Doctor: there has been testimony here that the Libelant, Mr. Lubinski, was examined for his eyes several months before he joined the vessel, and at that time they were found good, he passed the eye examination for both eyes; he had another similar examination about a year prior to that time with the same result, and his own personal history is that he never had any trouble with his eyes prior to that time, and, as far as he knew, they were all right and gave him no difficulty, and there was no history in his family of eye weaknesses or difficulties with the eye. With those additional facts, Doctor, can you then give us your opinion as to the cause of the condition which you found on your first examination?

Mr. Franklin: If I understand you, Doctor, you are [92] testifying that you found him suffering from iritis?

The Witness: That is correct.

Mr. Franklin: And as the result of your examination what did you find?

The Witness: As the result of my examination, and the taking of the history of the case, and in consideration that he had not had any eye difficulty

(Testimony of Dr. Purman Dorman.)

previous to the date of July, 1943, I came to the conclusion that that injury that he had received to his eye was amply sufficient cause for the eye condition as I found it.

Q. (By Mr. Levinson) Doctor, in your profession is it sometimes found that there is a systemic condition which may cause a similar condition to that which you found in Mr. Lubinski—is that true?

A. Yes; there may be systemic conditions.

Q. If there is such a systemic condition, how will it affect the sight of one eye compared to the other, or would it affect both eyes equally?

Mr. Franklin: You mean in iritis, or generally?

Mr. Levinson: You may cross examine later.

Mr. Franklin: I think it is only fair to advise the doctor what condition you are talking about.

The Court: The objection is overruled.

Q. (By Mr. Levinson) You may answer, Doctor.

A. I think it only fair in the discussion of this to limit our discussions more or less to what is present as to iritis or uveitis; and in general if an endogenous cause is responsible for the iritis, such endogenous cause being systemic, often such endogenous infection or trauma cause an involvement of both eyes. If it involves one [93] eye first—for it may do so—frequently the other eye is also involved, usually after but a short lapse of time between.

Q. The fact that in this instance you examined

(Testimony of Dr. Purman Dorman.)

the eye some eight months before, and found there is no particular involvement of the right eye, the good eye, as compared with the involvement you found at the time of your first examination, in March of 1944, would that support or be of any value to you in determining the question of causation, and the fact that it was or was not of endogenous origin?

A. Frequently, an endogenous trauma or infection will cause the involvement of the second eye within a short space of time.

Mr. Franklin: Just a moment; we move that answer be stricken as not responsive to the question.

The Court: It may be stricken.

Mr. Levinson: I think the question is proper, Your Honor.

Mr. Franklin: I submit the question to Your Honor.

The Court: Read the question and the answer.
(Question and answer read.)

The Court: The objection is overruled.

Q. (By Mr. Levinson) You may explain that further, Doctor, if you wish to.

A. Any time, any interval, that elapsed between approximately April 1 and January 1 would be sufficient to allow the involvement of the second eye, if such were from an endogenous origin.

Q. In the light of all your examination, and what you [94] know of this case, and the facts I have given you, is there any question in your mind

(Testimony of Dr. Purman Dorman.)

as to the cause of the present condition, with relation to the incidents which he gave you as of July, 1943?

Mr. Franklin: That is obviously improper, if the Court please, whether there is any doubt in the mind of this witness. It is immaterial what his opinion is.

The Court: That objection is sustained.

Q. (By Mr. Levinson) What is your opinion on that matter, Doctor?

Mr. Franklin: That is objected to as repetitious, if the Court please. He has already testified.

The Court: The objection is overruled.

The Witness: After the examination I am of the opinion that the present condition within his left eye could very easily and most likely have been the result of that injury, as he related it to me in my office upon the date of March 29, that injury having occurred as of about July, 1943.

Mr. Levinson: You may cross examine.

Cross Examination

By Mr. Franklin:

Q. Dr. Dorman, it is your opinion, then, that the blindness in Mr. Lubinski's left eye is due to and caused wholly and exclusively by the exposure to the smoke distress bomb at Attu, Alaska, on July 15, 1943?

A. To rephrase your question—with permission—was the smoke bomb solely responsible for the condition within [95] his eye?

(Testimony of Dr. Purman Dorman.)

Q. Is that what you referred to when you referred to his recent injury of July 15, 1943?

A. That is what I am referring to.

Q. So it is therefore your opinion that the blindness is attributable to no other circumstance than that incident?

A. No, that is not correct. It may have been aggravated, but it was not present before.

Q. Is what you are now saying, Doctor, that you think it was either caused or aggravated by the alleged exposure at Attu on July 15, 1943?

A. Well, I am sorry, but I cannot refer to the injuries by dates or places, but I can refer to it, and, possibly from my education, I would like to consider that there were two possible times, namely, the smoke exposure, the smoke bomb, and, second, the fire hose incident.

Q. Doctor, you are changing your answer, aren't you, and you are attempting to attribute some of this disability to the Kiska smoke exposure, and some of it to the earlier Attu bomb fume exposure—is that your position?

A. No. I am stating that the origin, the principal cause, was the smoke bomb exposure.

Q. Which occurred——

A. (Interposing) I do not remember where it occurred.

Q. At Attu, on July 15, 1943; is that correct, Doctor? A. That is correct.

Q. Do you know when this man became completely blind in his left eye?

(Testimony of Dr. Purman Dorman.)

A. No; I do not. [96]

Q. Did you find out from him?

A. I doubt if he would be able to tell.

Q. You mean a man would not know when he lost the sight of an eye?

A. That is right. That happens frequently.

Q. A man who has an eye that is giving him trouble so he is seeing a physician, would not know when he lost the sight in his eye?

A. That is correct.

Q. Doctor, do you know what the extent of his exposure in time of minutes was to the fumes on July 15?

A. He never described it in time by minutes, but at the time of his relation of the incident I would think that the total time exposure could not have been more than at most two minutes.

Q. Wasn't it important for you to find out how long it was exposed to this claimed deleterious fumes, so you would have some idea as to what the ultimate damage might be?

A. You can get deaf in a second.

Q. You thought it was two minutes in this case?

A. I never asked him specifically, but from the relation of the occurrence I would think that it would be probably about two minutes, the time occupied in going from the deck—he made several trips down in there and finally located about where it was, and then came down with a pair of heavy gloves, and having located it over there picked it up and got it up to the deck—I think two minutes.

(Testimony of Dr. Purman Dorman.)

Q. Doctor, do you know what kind of equipment Mr. Lubinski wore when he went down in the hold July 15, at Attu? [97] A. Yes.

Q. What did he wear?

A. He described the fact that there wasn't correct equipment, so therefore he donned what was available, an ordinary type of gas mask, and descended into this forepeak hatch to find what was causing it.

Q. Did he describe the type of gas mask to you, as to who issued it to him?

A. I believe it was issued to him by the Army personnel.

Q. Did he tell you it was defective equipment?

A. I don't remember that he stated that it was defective or correct.

Q. If it was a gas mask which enveloped his eyes and face, and he wore it during all his visits down in the forepeak, how could his eyes possibly be exposed to those fumes?

A. Gas masks, as I have investigated them in a fairly superficial way, are not designed for all types of gases or fumes or smokes, but are designed for particular ones, so that when a smoke——

Q. (Interposing) Do you know what this particular gas mask was designed for?

A. It was not designed for this distress bomb, according to the story which he gave me at that time.

Q. Do you know what the chemical contents of this distress smoke bomb were?

(Testimony of Dr. Purman Dorman.)

A. No. It contained some chemical that causes it to smoke after certain reactions take place.

Q. Do you know whether or not the chemical was an irritant or not to the eyes?

A. From what I understand, as told me by Mr. Lubinski, it [98] was irritating, not only to the eyes, but to the nose and throat.

Q. Doctor, you are aware of the general use of smoke distress signals and bombs in the present war? A. In a superficial way.

Q. You know they are usually and commonly employed by the United States Army and Navy for various signal purposes?

A. That is correct.

Q. You know, furthermore, that part of their purpose is the use of them within close proximity to soldiers and sailors and human beings?

A. That is correct, although sometimes, even though they are designed to be used in close proximity, they still may cause an irritation.

Q. When you saw Mr. Lubinski on March 1, 1944, he then had, unfortunately, a blind eye, didn't he? A. That is correct.

Q. Any layman could have told that?

A. No, not necessarily.

Q. And you say, Doctor, that you found him suffering from the after effect of a uveitis or iritis?

A. That is right.

Q. I will hand this document to you, Doctor.

A. I can see it, Mr. Franklin.

(Testimony of Dr. Purman Dorman.)

Q. Can you state what this document is that has been exhibited to you?

A. This is a diagrammatic cross section of an eyeball.

Q. Just as though you sliced the eyeball transversely, or in the center down?

A. As though you were to take a cross section of it, regardless [99] of whether it may be transversely or horizontally, or any meridian that may be chosen.

Q. If I understand the eye, the eye is a sphere which is encased in the bony orbit, known as the socket, is it not?

A. That is correct.

Q. And the eye is composed as a whole of three very tough membranes or layers known respectively as the sclera, the choroid, and the inner coating or retina, is that correct?

A. No. I am sorry. It consists of one tough coat, the sclera, which is the unyielding coat, and two inner layers. The choroid is the vascular layer, and the retina is the seeing layer.

Q. Externally, Doctor, what is the method of communication between the inner side of the eye and the outer side of the eye?

A. The method of communication between the inside of the eye and the outside consists of two systems, namely, the canal of Schlemm, which carries fluid from the anterior chamber outward and from the eye. The fluid within the eye is also carried out of the eye by means of the veins.

(Testimony of Dr. Purman Dorman.)

Q. The other surface of the eye, which protects it against all external objects entering it, is what? A. The epithelium.

Q. Is that a tough protective mechanism?

A. No; it is very thin.

Q. Within the eyeball, Doctor, you have what you call the iris? A. That is correct. [100]

Q. And you have what you call the ciliary body?

A. That is right.

Q. And that is called the uvea?

A. That, together with the remainder of the choroid, is termed the uveal coat.

Q. When you use the term "iritis," as in this case, or "uveitis," you mean an inflammation or infection of the inner portion of the eye, of the iris and adjacent tissues? A. That is right.

Q. And that is protected against external penetration or effects of external trauma by what factors?

A. The protective mechanisms are the outer lying coats, the endothelium, the epithelium, the sclera and the blood vessels.

Q. So when a person says, "I have got something in my eye," in reality he generally means he has something on the outside surface of the eye?

A. Absolutely right.

Q. What protection does the eye have to prevent irritants, or objects that lodge on the eyeball itself from entering or becoming imbedded within the eye, and damaging the inner structure? Don't

(Testimony of Dr. Purman Dorman.)

you have the lachrymal fluid that bathes the eye in tears, and washes off all dirt and irritation?

A. That washes them off if they are superficial.

Q. What is the cause of iritis, Doctor?

A. Books have been written as to the cause of an iritis, but briefly, an iritis may be caused by one of two causes, termed in medical language—and I use it [101] purposely—exogenous and endogenous.

Q. Can you shorten those up for us, please?

A. Exogenous are those causes outside the eyeball, which may be the surrounding structures, and the endogenous are those things which are usually contained within the human system, the human body.

Q. That is the classification employed by Fuchs in his "Diseases of the Eye"?

A. I do not know.

The Court: At this point we will take a ten minute recess.

(Recess)

The Court: You may proceed.

Q. (By Mr. Franklin): Doctor, in lay language, aren't the only two causes of iritis, traumatic iritis, due to injury, and endogenous iritis, which arises from some source of infection in the blood stream, such as syphilis, gall bladder, tonsils, or teeth?

A. There have been several attempts at classifying the causes of iritis. That classification which

(Testimony of Dr. Purman Dorman.)

you have given may be one of a particular authority.

Q. Are you familiar with Fuchs' "Diseases of the Eye"? A. I am.

Q. Is that book a textbook, a substantive authority in your profession?

A. Yes. It is an excellent book.

Q. I will hand you Fuchs' book, and direct your attention to Paragraph 219, at Page 280, and ask you if you will be good enough to read it, please, and read it out loud.

A. (Reading) "Primary Iridocyclitis. Iridocyclitis [102] arises after perforating injuries."

Q. Do you agree with that statement, Doctor, that the only traumatic type of iritis or iridocyclitis would be a penetration that would introduce the endogenous matter right through the eyeball from without?

Mr. Levinson: I object to Counsel's misstatement, if Your Honor please.

The Court: That objection is sustained, because I do not understand his statement to be what Counsel said it meant.

Q. (By Mr. Franklin): Doctor, do you agree with that statement made by Fuchs, as to the exclusive classification of traumatic iridocyclitis?

Mr. Levinson: I again object, your Honor. There is no reference that it is exclusive.

The Court: You can ask him if he agrees with the statement.

(Testimony of Dr. Purman Dorman.)

Q. (By Mr. Franklin): Do you agree with that statement as read?

A. That statement is not the complete statement of Fuchs.

Q. Would you show me wherein there is any classification in that volume, Doctor?

Mr. Levinson: I submit that is not proper cross examination.

The Court: Objection overruled.

A. This is not Fuchs' book. Under no guise is it Fuchs' book. It only has the name of Fuchs. Fuchs died in 1926.

Q. Doctor, is that book a recognized and standard treatise and authority in the profession in which you practice? [103]

A. This book, under the title of "Fuchs' Pathology" is an authority, of which there are several.

Q. And regarded so by your profession?

A. And regarded so by my profession.

The Court: Doctor, is classroom teaching part of your professional work? Is part of your everyday work classroom teaching or public speaking?

The Witness: Is this on the record?

The Court: I would like to know; yes.

The Witness: Yes. I have given several courses in connection with the eye to various organizations, various students at various times.

Q. (By Mr. Franklin): Doctor, I will hand you a volume entitled "The Relation Between Injury and Disease," published by Bobbs-Merrill and Company in 1938, and ask you to examine this and

(Testimony of Dr. Purman Dorman.)

state whether or not you are familiar with the contents of this work?—which I presume you are.

A. I am not familiar with this book.

Q. Do you know whether or not that is regarded as one of the latest authorities on the question of the connection between injury and disease, in the medical profession?

A. Being unfamiliar with the book, I would not be qualified to pass upon that.

Q. Doctor, do you agree with the statement which is made in this work——

Mr. Levinson: (Interposing) Just a moment, Your Honor; in view of the doctor's statement that he is not familiar with the work I submit it is improper cross examination to refer to that book.

Mr. Franklin: I think, Your Honor, he can testify whether he agrees with these few words.

The Court: The objection is overruled.

Q. (By Mr. Franklin): Doctor, would you state whether or not you agree with the following statement, found at Page 522:

“Each of the various forms of iritis mentioned above has not infrequently been ascribed by workmen to some injury incident to their occupations. This is especially true of syphilitic iritis, a condition which develops apparently spontaneously, reaching its maximum degree of severity within two to four days from its onset, hence is a condition which the patient is very likely to attribute to some trauma received during the preceding several days or weeks. Many other patients erroneously ascribe

(Testimony of Dr. Purman Dorman.)

their iritis to gases or fumes that recently may have irritated their eyes.

“Iritis never is due to the presence of foreign bodies in the conjunctival sac, nor to nonpenetrating injuries of the cornea or sclera, nor to the irritation of the conjunctiva by chemical agents. In fact, the only form of iritis which can be directly attributed to trauma is that which follows penetrating wounds of the eyeball which reach an expose the iris.”

Do you agree with that statement?

A. No, sir. I am sorry. It is too dogmatic a statement, because there are exceptions.

Q. When Mr. Lubinski presented himself to you for examination [105] did you make any examination yourself by X-ray or otherwise to determine whether he was suffering from any systemic infection?

A. No, I did not.

Mr. Franklin: That is all. Thank you, Doctor.

Redirect Examination

By Mr. Levinson:

Q. Just one other question, Doctor. An irritant gas which comes in contact with the human body, what is the effect of that irritant, compared to the various parts of the body with which it may come into contact, with reference to either a dry surface or a mucuous or wet surface? Is there a difference?

A. Is there a difference in reaction, as I interpret it, between the various surfaces?

(Testimony of Dr. Purman Dorman.)

Q. That is right.

Mr. Franklin: If the Court please, we object to that.

Mr. Levinson: This may be direct examination, but I overlooked it.

Mr. Franklin: I am not making that objection, but I object unless the Doctor is furnished with evidence as to the chemical composition of the gas. If not, he obviously cannot answer. It is speculation.

Mr. Levinson: That is a matter of cross examination.

The Court: The objection is overruled.

Q. (By Mr. Levinson): Will you answer the question?—whether there is a difference? [106]

A. Is there a difference in reaction upon certain portions of the body to an irritant, as, for example, a dry skin or a moist skin?

Q. Yes.

A. To that question the answer is yes, and it is typified in everyday life, because I will be in a smoke-filled room and my eyes will be red and irritated, but the skin of my hands suffers no irritation, or the skin of my face suffers no irritation, and so it is true of many a gas. The skin of the eyes or nose, frequently of the mouth, may be irritated, whereas the remainder of the skin, the dry skin, suffers no irritation.

Q. Does the affinity or the chemical combination of the moisture of either the mucuous membranes

(Testimony of Dr. Purman Dorman.)

or the surface of the eyeball activate or affect some gases?

A. That reaction is not always the same. Sometimes it is due to the presence of moisture in the different membranes. Sometimes it is due to a change in the composition of that membrane.

Mr. Levinson: I think that is all.

Recross Examination

By Mr. Franklin:

Q. Do you know what this gas was at Kiska?

A. No.

Q. The chemical contents? A. No, sir.

Mr. Franklin: That is all, thank you.

Mr. Levinson: May the Doctor be excused?

The Court: He may be excused.

(Witness excused)

Mr. Levinson: If Your Honor please, these boys outside are waiting for their calls on the board. They are waiting to be shipped out, and with Your Honor's permission I would like leave to call some of the other men rather than continuing with Mr. Lubinski, so they can be excused.

The Court: That is agreeable to the Court, and that may be done.

WILLIAM HUCK

called as a witness on behalf of Libellant, being first duly sworn, testified as follows:

(Testimony of William Huck.)

Direct Examination

By Mr. Levinson:

Q. Will you state your name, please?

A. William Huck.

Q. Where do you live?

A. 2329 Yale Avenue North, Seattle.

Q. What is your occupation? A. Seaman.

Q. How long have you followed that occupation?

A. Thirty-two years.

Q. In the deck department on vessels?

A. Yes, sir; all the time.

Q. Mr. Huck, are you familiar with the custom and practice [108] of stowing combustible materials on merchant vessels of the United States? Answer that question yes or no. A. Yes, sir.

Q. What is that practice with relation to the stowing of any combustible material in the forepeak of a vessel?

Mr. Franklin: That is objected to, if the Court please, as incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Franklin: An exception, Your Honor.

The Court: Exception allowed.

A. Well, all paints, all combustibles are stored in an airtight—well, it is not air-tight, but it is tin lined and a steel door, no portholes, and a smothering system.

Q. Is it customary or is it good seamanship to stow such materials in the forepeak of a vessel where they have ship's stores?

(Testimony of William Huck.)

A. No, sir; it is not.

Q. Mr. Huck, you are an active merchant seaman? A. Yes, sir.

Q. You have been working as such on vessels during these war times? A. Yes, sir.

Q. Carrying war cargoes? A. Yes, sir.

Q. To Alaskan waters? A. Yes, sir.

Q. Mr. Huck, under those conditions, the carrying of war cargo and war material to Alaskan waters, who is responsible for the loading of the ship and for the manner of its stowage? [109]

Mr. Long: That is incompetent, irrelevant and immaterial, Your Honor, and certainly could have no binding effect on the issue in this case. The ship was taken over by the Army for the invasion. What may be the practice on some other ship going from here to Juneau, even though it may have war materials aboard, would certainly have no relationship to invasion, a vessel taken over exclusively by the Army.

The Court: The objection is overruled.

Mr. Long: An exception, please.

The Court: Exception allowed.

A. Well, the master is really in charge of the ship.

Q. Who is the officer directly under him who has supervision over that?

A. The chief officer, or first mate.

Mr. Levinson: You may cross examine.

(Testimony of William Huck.)

Cross Examination

By Mr. Franklin:

Q. You were not a member of the George Flavel at the time of the Kiska invasion?

A. No, sir.

Q. You were not a member of the crew?

A. No, sir.

Mr. Franklin: That is all.

Mr. Levinson: That is all.

(Witness excused) [110]

JOHN CONNOLLY

called as a witness on behalf of Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Levinson:

Q. Will you state your name, please?

A. John Connolly.

Q. What is your occupation?

A. At the present time I am able seaman.

Q. How long have you been following that occupation?

A. I have been going to sea since 1914, up to 1926, and from 1926 until 1941 I was a longshoreman in the city of Seattle. At the present time I am a seaman.

Q. Since 1941? A. Yes, sir.

Q. Where is your home?

A. In Seattle, sir.

(Testimony of John Connolly.)

Q. Mr. Connolly, are you familiar with the customary practice from the standpoint of good seamanship as to the stowage of combustible materials on a vessel? Answer that yes or no, first.

A. Yes.

Q. Mr. Connolly, can you tell us whether it is good seamanship or custom to stow combustible material of any nature in the forepeak of a vessel where ship's stores are kept, and the men go in and out?

A. No, sir.

Mr. Franklin: Just a moment, please; we object to that, if the Court please, on the ground that the question [111] is incompetent, irrelevant and immaterial, and no proper proof of custom binding the Respondents in this case.

The Court: The objection is overruled.

Q. (By Mr. Levinson): Will you answer the question?

A. No, sir.

Q. Mr. Connolly, have you sailed on vessels since 1941 carrying military and war cargo?

A. I have, sir.

Q. To Alaskan waters?

A. Yes, sir.

Q. In the carriage of such cargo by such vessels are you familiar with the practice—or can you tell me in the carriage of such cargo by such vessels who is the person in charge of the loading of such vessel, and the stowage of its cargo? Answer that yes or no, first, whether you can tell me that.

A. Yes, I can tell you, sir.

Q. Who is the person?

(Testimony of John Connolly.)

A. The chief officer, sir.

Mr. Franklin: If the Court please, we move that the answer be stricken.

The Court: The motion is denied.

Mr. Levinson: You may cross examine.

Cross-Examination

By Mr. Franklin:

Q. You were not present, of course, Mr. Connolly when the Flavel was loaded in San Francisco, about June 23, 1943? A. No, sir. [112]

Q. Do you know who was in charge at that time? A. No, sir.

Mr. Franklin: That is all.

Mr. Levinson: That is all.

The Court: These two men may be excused, the last two witnesses.

(Witness excused)

WALTER C. LUBINSKI

recalled as a witness on behalf of Libelant, having been previously duly sworn, testified further as follows:

Cross Examination—(Continued)

By Mr. Franklin:

Q. Mr. Lubinski, when you went forward at the time of the Kiska fire, whose gas mask did you employ before you went down in the forepeak?

A. That is something I don't know, sir.

Q. It was an Army gas mask, was it?

(Testimony of Walter C. Lubinski.)

A. I suppose so. A regulation gas mask.

Q. You have so testified, haven't you?

A. Yes.

Q. In your earlier deposition, that it was an Army gas mask? A. Yes, sir?

Q. From what you observed of that gas mask, and the use you subjected it to, was it satisfactory and efficient in every way?

A. I suppose so, sir. [113]

Q. Well, was it or wasn't it?

A. Yes, sir.

Q. It was? A. Yes.

Q. Mr. Lubinski, how long were you down there exposed to these fumes at Kiska—I mean at Attu?—at Attu on July 15, 1943?

A. Did you say "exposed"?

Q. Yes, sir. How long in terms of minutes were you down in the forepeak at Attu, and exposed to those fumes?

A. Oh, I would say around fifteen minutes.

Q. Do you know the contents of those bombs, what the chemical composition was?

A. No, sir; I do not.

Q. Mr. Lubinski, did other men use the same mask that you used at Attu, to go down in the forepeak and search for this—

A. (Interposing) They used the same type; yes, sir.

Q. Didn't the mate use the same mask, or Mr. Seather, the second officer?

A. I do not recall that.

(Testimony of Walter C. Lubinski.)

Q. Would you describe to the Court what this mask was like, and how it fitted over the face, and what the breathing space was?

A. Well, it is a black or rubberized composition, with a rubber strip that fits over the head, with goggles, and has this little blower.

Q. A canister?

A. No; not a canister; just a regular blower. When you breathe through it is the same as blowing a bazoo; it [114] flaps up and down.

Q. There is a mouthpiece, isn't there?

A. No.

Q. How do you breathe?

A. Just the same as we are breathing now.

Q. Is the mouthpiece filtered with a very fine mesh?

A. I don't know. I couldn't answer that.

Q. How are the eyes protected against fumes or gas in that mask that you wore?

A. It has these goggles and the mask fits over it.

Q. Does the rubber outside of the mask fit right tight over the goggles, the rubber composition fits right into the goggles? A. It does; yes, sir.

Q. And that whole mask, then, fits tightly over the face?

A. It fits over this part of the face. (Illustrating) It covers half your face.

Q. Who brought the smoke bomb up from the forepeak at Attu, after it was discovered?

A. That I don't know.

(Testimony of Walter C. Lubinski.)

Q. Didn't you assist in bringing it up?

A. I did not, sir. I assisted in finding it, but who brought it up I don't know. I don't recall that.

Q. Where did you find it?

A. It was floating, sir; floating around in the forepeak.

Q. What part of the forepeak, if you know?

A. I don't know.

Q. Subsequently did you make any investigation or examination to determine whether one of the cartons had been broken into and one of the smoke bombs removed? [115]

A. I did see that, yes; once.

Q. What did you see?

A. I seen there was one can missing.

Q. When you say "missing," what was the condition of the carton or container in which it had been resting?

A. It was ripped open.

Q. I beg your pardon?

A. It was torn open, or ripped open.

Q. Mr. Lubinski, how long after the exposure at Attu before you became completely blind in your eye?

A. Well, I couldn't say any definite time. I was just gradually getting blind.

Q. When was it on this voyage that you were first aware that you were blind, or could only distinguish light from darkness?

A. I cannot answer that. I don't know.

(Testimony of Walter C. Lubinski.)

Q. Mr. Lubinski, how long were you exposed to the fire at Kiska on the morning of the invasion?

A. Oh, I would say about twenty or thirty seconds, sir.

Q. How long were you down in the hatch before you were struck in the face by the water from the deck?

A. Around eight or ten minutes, I guess.

Q. What was the condition with reference to visibility in the hatch during those eight or ten minutes?

A. Down below?

Q. Yes. Was the entire hatch up to the coaming smothered in smoke?

A. It was smothered in smoke at different intervals.

Q. Because of that smoke didn't you have to feel your way around the hatch? [116]

A. Yes, sir; at different intervals.

Q. You do not know who turned the hose on you, do you?

A. No, sir. I couldn't see that.

Q. You say that just when you were at the foot of the ladder going up to the hatch that somebody directed a stream of water and dislodged your mask?

A. Yes, sir.

Q. Was this the same type of mask you had used at Attu?

A. Yes, sir.

Q. Was this likewise a fairly satisfactory and efficient mask?

A. Yes, sir.

Q. Mr. Lubinski, when the water was hurled against your face so that your gas mask was

(Testimony of Walter C. Lubinski.)

knocked off or away from your face, was it knocked completely off or just sideways?

A. It just swept it off like that. (Illustrating)

Q. Did it fall to the ground?

A. No, sir; it did not fall.

Q. To readjust the mask all you would have been obliged to do would have been to replace it?

A. Yes.

Q. Swing it back into position?

A. Yes, sir.

Q. And that would have taken how long a period of time?

A. I didn't have a chance to do that, because they kept hitting me with the hose. I kept yelling up from the hatch.

Q. Why didn't you readjust your mask before you ascended to the hatch? [117]

Mr. Levinson: He has just answered that, Your Honor.

The Court: The objection is overruled. He may answer the question.

A. Well, things happened so fast I just can't explain that.

Q. (By Mr. Franklin): Mr. Lubinski, when was it that you first learned the identity of this seaman you say kicked the smoke bomb at Attu, on July 15, 1943?

A. When was election day?—November 7?

Q. November 7. A. November 7, 1944.

Q. Up to that time you didn't know who it was?

A. No, sir; I did not.

(Testimony of Walter C. Lubinski.)

Q. Did you ever make any complaint to the chief mate or any of the other officers of the ship as to the fact that your eyes had been injured by reason of the exposure to the distress signal fumes at Attu? A. I did.

Q. To whom did you make those complaints?

A. To the chief officer.

Q. The chief officer is Mr. Kristiansen?

A. That is right.

Q. How soon after the accident at Attu, July 15, 1943, did you make that complaint?

A. Well, right after the exposure to the smoke. After we found out what it was I went down to the doctor and he washed my eyes out with boric acid.

Q. I asked you when did you first make the complaints to the chief mate?

A. The next morning. [118]

Q. Did you continue to make those complaints as the voyage progressed?

A. I didn't have to. The chief mate came down in my room every day. He seen what was wrong with me.

Q. Did you discuss very frequently with the chief mate, after the Attu smoke distress bomb, that you were troubled with your eyes as the result of the exposure to those fumes? A. I did.

Q. Did you discuss that with any other member of the officer personnel of the vessel?

A. No, sir; outside of the Army doctor.

Q. Mr. Lubinski, when did you first make any

(Testimony of Walter C. Lubinski.)

contention that your gas mask had been dislodged at Kiska on the morning of the invasion?

A. I don't understand that.

Q. When did you first make any claim of that character to the ship's officers, or representatives of the Alaska Steamship Company?

A. I don't quite understand that question.

Q. In your libel you claim that on August 15, 1943, by reason of the negligence of a fellow seaman in directing the contents of a hose in your direction, that your mask was dislodged, and by reason thereof your eyes were irritated. My question is, when did you first make that claim or contention with reference to your injury?

A. I still don't understand you.

Q. Did you ever complain to the officers that you had been struck in the face by water at Kiska on August 15, 1943, and your eyes damaged by reason of that irritation? [119]

A. Well, I did, sir, but I didn't have to complain. We were all hit with the water.

Q. During the month of November, 1943, did you have occasion to make a written claim with relation to the condition of your eyes?

A. I did, sir.

Q. Where did you make that written claim?

A. In Mr. Black's office, in San Francisco, California.

Q. You were referred to him, were you not, by the Alaska Steamship Company?

(Testimony of Walter C. Lubinski.)

A. I was referred to him by Mr. Belie, of the Grace Line.

Q. Had you discussed your condition with Mr. Belie, of the Grace Line?

A. Just for a few minutes, and he sent me to Mr. Black.

Q. Did you tell Mr. Belie at the time of your discussion with him as to your condition, as to the occurrence of the Kiska incident on August 15, 1943?

A. I may have, sir, and I may not have. I don't recall.

Q. Do you have any recollection as to whether you did or did not?

A. I said I don't know, sir.

Q. Mr. Lubinski, how many times did you have occasion to discuss the matter of your injury at Mr. Black's office?

A. Oh, three or four times.

Q. Do you remember the individual you consulted and contacted in relation to your claim?

A. Mr. Ray Frick, sir.

Q. Did you give Mr. Frick any signed statement relative to the occurrence of your trouble?

A. I did, sir. [120]

Q. Was that a long typewritten statement?

A. It was, sir.

Q. And in that statement that you gave Mr. Frick did you make any mention of or make any reference to the injury which occurred at Kiska, Alaska, August 15, 1943, with specific reference to

(Testimony of Walter C. Lubinski.)

the fact that a seaman had played a hose upon your face so that the gas mask was knocked off?

A. I don't recall that.

Q. Would you say that you did? Is it your recollection now that you did or did not advise Mr. Frick of that incident?

A. I don't know, sir. It has been quite a while ago.

Q. Mr. Lubinski, I will first show this document to Counsel and then hand it to you, a typewritten statement, and ask you if that is the statement you signed in Mr. Frick's office relative to the occurrence of this injury, and which I notice is signed on each page.

(Document marked for identification Respondents' Exhibit A-1.)

That is the statement you signed, Mr. Lubinski?

A. Yes; that is.

Q. As a matter of fact, your signature appears on each of the three sheets, does it not?

A. Yes, sir.

Mr. Franklin: If the Court please, we offer that statement in evidence.

Mr. Levinson: I have no objection.

The Court: That exhibit is now admitted in evidence as Respondents' Exhibit A-1. [121]

(Document received in evidence as Respondents' Exhibit A-1.)

(Testimony of Walter C. Lubinski.)

RESPONDENTS' EXHIBIT No. A-1

I, Walter C. Lubinski, signed on the S.S. "George Flavel" on Coastwise articles at San Francisco on June 23, 1943 as bos'n. I reside at 56 Mason Street, San Francisco, California.

On or about July 15, 1943 at about 10 o'clock P.M. while the vessel was at Attu, Aleutian Islands, the fire alarm was sounded by the sounding of the ship's bell. It was my duty upon the sounding of the fire alarm to go to my fire station at hydrant No. 8 situated between the No. 4 and 5 hatches amidships. However, someone called out "fire in forepeak," and as I could see smoke coming from the forepeak, I immediately went there to do what I could under the circumstances. I put on a gas mask which was the regular standard mask, and which we had all been issued and which was in first class condition in every way. I went down into the forepeak, in fact I was the first one to go down, and I remained down there about ten minutes on this first occasion. I discovered that the plug in a distress signal which was in the forepeak had been pulled out by someone which, of course, released the orange colored smoke from the distress signal. This distress signal is substantially the same as a one gallon can with a plug in the top, and the purpose of it is to release an orange colored smoke to be seen by the searchers in case of distress.

I had no idea who pulled this plug out of the distress signal as there were some 1,200 troops aboard,

(Testimony of Walter C. Lubinski.)

about a hundred sailors in addition to the crew of the vessel which numbered about fifty men.

After remaining down in the forepeak for about ten minutes, I came up for air, and I went down again on three other occasions for periods of about ten minutes each. It was necessary to make a number of trips down into the forepeak because at first the smoke was so dense we could not see our way around, and I wanted to be certain there was in fact no actual fire.

About eight hours after the above-described incident, my eye-lids commenced to swell up, and I reported to Captain Paul Ziegler, the doctor aboard the vessel, who put some drops in my eyes and told me I would be all right in a short time. Several days later the swelling in my eye-lids had gone back to normal.

On or about August 15, 1943, we participated in the invasion of Kiska at about 10:30 A.M., and at this time a fire broke out in the No. 3 hold. While I did not actually see what caused this fire, I was told by Army officers that a soldier had started up a snow jeep and that a spark or something ignited some of the sleeping bags which were stowed in the No. 3 hold, and in turn wood and coal became ignited and were smoldering, and there was a great deal of smoke. I also went down into the No. 3 hold after putting on my gas mask, and stayed down there for such long periods of time as I could stand it, and after about two hours we got this fire out.

(Testimony of Walter C. Lubinski.)

It seems to me that almost immediately after the incident involving the distress signal, I began to lose vision in my left eye, and this continued to get worse, and after the Kiska fire, I apparently had practically lost my entire vision in the left eye. My right eye is perfectly all right. While the vessel was at Adak, Aleutian Islands, on about September 7th, I reported to Lt. Kaven, a Navy eye specialist. This was the first opportunity I had had to report to any doctor ashore. In other words, at the very first opportunity, I requested to be sent ashore, which request was granted, and I was examined by this specialist. Dr. Kaven prescribed boric acid saturated solutions twice a day for 20 minute periods, which instructions I followed.

The vessel then proceeded to Honolulu and arrived there about September 15, 1943. Because of a Naval regulation which prohibits anyone going ashore for 24 hours after arrival, I was not able to report to a doctor there until the following day, and I then reported to the U. S. Public Health Service, and was examined by Dr. Brown who put some drops in my eyes, and I was then examined by Dr. Morgan, who also put some drops in my eyes and diagnosed my condition as iritis. I then returned to the vessel, and we sailed the following day for Seattle, Washington, arriving there about September 24, 1943, and we paid off for the entire voyage on September 28, 1943, and I received all of my straight wages, overtime and bonuses for the entire trip.

(Testimony of Walter C. Lubinski.)

After waiting for eight days for transportation, I proceeded to San Francisco by train, arriving October 6, 1943. We were put off the train at Portland for two days by Military Authorities, and I stopped at a hotel, the name of which I believe was the "Rosalyn." While at Portland, I did not seek any medical attention.

After arriving at San Francisco on October 6th, I did not report to the Marine Hospital until October 16th, and I was then made an outpatient until October 18th, when I was made an inpatient and remained as such until November 5, 1943, when I was again made an outpatient, and I am presently under outpatient treatment.

I have read the foregoing statement, and it is true and correct in all respects.

WALTER C. LUBINSKI

Witness:

SHIRLEY K. OLDROYD

San Francisco, California

Dated: November 13, 1943.

Mr. Franklin: I will ask to have this marked for identification.

The Court: It may be marked for identification.

(Document marked for identification Respondents' Exhibit A-2.)

Mr. Franklin: We offer that certificate in evidence. Counsel says there is no objection.

(Testimony of Walter C. Lubinski.)

The Court: Respondents' Exhibit A-2 is now admitted in evidence.

(Document received in evidence as Respondents' Exhibit A-2.)

RESPONDENTS' EXHIBIT No. A-2

Given to patient.

CERTIFICATE OF HOSPITAL AND OUTPATIENT TREATMENT

U. S. Marine Hospital, San Francisco, Calif.

Date January 14, 1944

1. Name of patient Lubinski, Walter C.
2. Brief abstract of patient's statement as to how and when disability was incurred: Patient states he had iritis, left eye, about Aug. 1943 while in Alaska. (Rept. by Navy Dr.) Never wore glasses.
3. Diagnosis: Chronic iridocyclitis of left eye.
4. Complications and operations: None.
5. Date of admission to hospital: October 18, 1943.
6. Date of discharge from hospital: November 5, 1943.
7. Date of admission to outpatient department: October 16, 1943.
8. Date of discharge from outpatient department: Not yet discharged.
9. Condition on discharge: Not yet discharged from outpatient treatment.

(Testimony of Walter C. Lubinski.)

10. Number of days completely disabled: From October 16, 1943 to January 14, 1944 and continuing indefinitely.

12. Prognosis: Guarded.

[Seal]

S. L. CHRISTIAN

Medical Officer in Charge

FK

N. B.—This certificate is furnished to the patient to enable him to collect insurance benefits that may be due him and is to take the place of the certificate required by the insurance companies from private physicians who attend persons insured. It is compiled from the official records of the hospital and is signed by a medical officer of the United States Government over his official title.

Q. (By Mr. Franklin): Mr. Lubinski, before your service aboard the Flavel, about 1941, did you have occasion to have medical treatment for any condition?

A. I did.

Q. For what condition?

A. I had a localized soft chancre, in Panama.

Q. You were on board the vessel Lake Frances at that time? A. I was.

Q. How long were you hospitalized at Panama because of that condition?

A. About ten days.

(Testimony of Walter C. Lubinski.)

Q. Was the usual syphilitic treatment given you for that condition?

Mr. Levinson: Just a moment; that is not what this man said.

Q. (By Mr. Franklin): What treatment was given you for that condition? [122]

A. Just the same as you would treat a little boil or pimple.

Q. Since that time have you had any recurrences of that condition? A. I have not, sir.

Q. Have you had frequent blood tests?

A. I have, sir.

Q. How many since that time, in all, roughly?

A. Oh, roughly I would say between ten and fifteen.

Q. What has been the result?

A. Wasserman's and Kann's, all negative.

Mr. Franklin: That is all. Thank you.

Redirect Examination

By Mr. Levinson:

Q. Do you recall, Mr. Lubinski, where the amphibious gear was stowed when you left San Francisco?

A. It was over on the port side, forward.

Q. On what deck?

A. On the forward deck.

Q. How was it covered? A. With a tarp.

Q. Was it lashed down?

A. It was also lashed secure.

Q. In your opinion as a seaman was it lashed and secured in such a way——

(Testimony of Walter C. Lubinski.)

A. (Interposing): It was seaworthy; yes, sir.

Q. That was the condition when you left?

A. Yes.

Q. Counsel asked you when you discovered that these smoke [123] bombs had been moved into the forepeak, and you stated some five or six days after you left San Francisco. What was the incident that caused you to discover that?

A. Myself and a couple of sailors were going down to splice some wire slings, and all this stuff was stowed down there; and those forepeaks are small, anyway, and that is what made us discover the stuff.

Q. Were you able to do your work normally with the material there? A. No, sir.

Q. What was the trouble?

A. All that stuff was in the way there.

Q. That stuff that was in the way, was it ordinary ship's gear that belonged in there?

A. No, sir.

Q. Had you made any report or objection to the mate about that? A. Yes, sir; I had.

Q. What was his reply?

Mr. Franklin: That is repetitious, if Your Honor please.

Mr. Levinson: Yes; I covered that.

Q. (By Mr. Levinson): When the vessel got to Attu did the vessel participate in the Attu invasion as such?

A. No, sir.

(Testimony of Walter C. Lubinski.)

Q. Do you recall whether or not the invasion was over when you got there?

A. There was already a dock built there, sir.

Q. Was it under any activity at that time?

A. No, sir. The island was cleaned up. [124]

Q. What did you do at Attu in connection with taking on any additional men or cargo?

A. We came alongside the dock, and we were the second ship alongside the new dock, and the troops were all out. We unloaded the troops, disembarked them.

Q. This fire that occurred, did that occur before or after the vessel had come alongside the dock?

A. After the vessel came alongside the dock.

Q. Counsel has directed your attention to a certain statement which you signed in the office of Mr. John Black. Who is Mr. John Black?

A. I never met Mr. Black.

Q. What is his office when you go up there? What does it say on the door?

A. It says "John Black," or something. I don't recall what it states on the door.

The Court: Is he employed by the State of Washington or the steamship company, or the Union or the United States, if you know?

The Witness: To my knowledge, sir, he is an insurance lawyer.

Q. (By Mr. Levinson): By whom were you sent to Mr. Black's office?

A. Mr. Belie.

(Testimony of Walter C. Lubinski.)

Q. Is Mr. Frick also in that office, associated with Mr. Black? A. Yes, sir.

Q. And is Miss Oldroyd in that office, also employed by Mr. Black?

A. I don't know. There is probably twenty girls there. [125]

Q. This was in about November, 1943; is that about right? A. Yes.

Q. In what city? A. San Francisco.

Q. Were you then under treatment at the hospital? A. Yes.

Mr. Levinson: I have no further questions.

Recross Examination

By Mr. Franklin:

Q. What hospital do you mean?

A. The United States Marine Hospital; San Francisco, California.

Q. As part of the settlement of the negotiations, or discussions with Mr. Frick, were you sent for examination to a Dr. Berkan, in San Francisco, California? A. I was.

Q. During all this time you were a patient of the United States Marine Hospital at San Francisco? A. I was, sir.

Q. What was the name of the physician at the United States Marine Hospital who was treating you during all this time?

A. Dr. Schumacher.

Q. You were under his care for treatment exclusively for what period of time, roughly?

A. Five months.

(Testimony of Walter C. Lubinski.)

Q. From October until you came north?

A. Until February.

Q. You came north in February, 1944? [126]

A. Yes.

Q. You were employed as a patrolman at the Seamen's Union until what time?

A. I am still employed.

Q. I understood you to say an adverse election had affected your status.

A. Well, I am in office until the 8th of February.

Q. On a monthly salary of \$79 a week?

A. That is correct.

Mr. Franklin: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Levinson: Your Honor, I now have some depositions.

The Court: If that is true we will take a fresh start on that tomorrow morning. The Court will now be adjourned until tomorrow morning at 10 o'clock.

(Whereupon an adjournment was taken until January 10, 1945, at the hour of 10:00 A.M.)

January 10, 1945

10:00 O'Clock A.M.

The Court: Are the parties ready to proceed?

Mr. Levinson: The Iibelant is ready.

Mr. Franklin: The Respondents are ready.

The Court: I may have to ask the indulgence of

counsel at times during the day with expected interruptions in connection with some administrative matters that have been before the Court for a day or two.

Mr. Levinson: May I also ask the indulgence of your Honor. I find that I have an appointment at four o'clock this afternoon that is rather important.

The Court: We will try to arrange it, Mr. Levinson. Do you have any better idea now how long you think the case will take?

Mr. Levinson: The Libelant has only two depositions which I think will be concluded in about 30 minutes. That is all we have for the Libelant. There are perhaps half a dozen depositions, some of them quite long, for the Respondents. I do not know how many the Respondents intend to use. And I understand there will be extra testimony. As far as we are concerned I am quite sure that we will be through in about 30 minutes.

Mr. Franklin: I would anticipate, your Honor, that we would conclude our case normally today. We have two witnesses whose testimony will be quite brief, and then the depositions, some of which we probably will not find it necessary to introduce in evidence. So I would expect to conclude our case today. We are perfectly agreeable to [128] accommodating counsel as to his four o'clock appointment.

The Court: Off the record.

(Discussion off the record.)

You may proceed with your depositions for the Libelant.

Mr. Levinson: Your Honor, we will proceed with the reading of the deposition of Steve Uzdadinis. This deposition was taken in my office at Seattle on November 9, 1944.

STEVEN UZDADINIS,

called as a witness on behalf of Libellant, testified by deposition as follows:

Direct Examination

By Mr. Levinson:

Q. Will you state your name, please?

A. Steven Uzdadinis.

Q. What is your occupation, Mr. Uzdadinis?

A. I am a sailor.

Q. How long have you been going to sea?

A. About six years.

Q. In what part of the crew do you sail?

A. I have sailed on both the deck and the steward's department.

Q. You are at present on a vessel?

A. Yes, I am.

Q. And you do not know whether you will be here at the time this case comes to trial?

A. I have no idea about it.

Q. You have no idea where you will be? [129]

A. No.

Q. You are a merchant seaman, regularly employed?

A. That is right.

Q. Were you a member of the crew of the

(Deposition of Steven Uzdadinis.)

Steamship George Flavel sometime in the summer of 1943? A. I was.

Q. Were you a member of the crew of that vessel on its voyage from San Francisco to the Aleutian Islands? A. I was.

Q. On that voyage state generally what was carried, as far as you know.

A. As far as I know there was a little ammunition, there was coal, there was wood, and there was jeeps.

Q. A general military cargo?

A. General military cargo.

Q. Did you have any other crew or any other passengers on that ship, as well as the regular ship's crew?

A. A few Army personnel, troops, that was all—troops and the amphibious crew.

Q. As part of the cargo of that vessel, can you state whether or not there were any so-called smoke bombs?

A. I wouldn't say it was part of the cargo, but that hatch belonged to the amphibious crew.

Q. It was being carried on the vessel?

A. It was being carried on the vessel, yes.

Q. Do you know where it was originally stowed before it was stowed in the forepeak?

A. No, I don't.

Q. When you became aware of the place of its stowage, where was it stowed? [130]

A. I know it was stowed below, in the forepeak, and at the time it was stowed I noticed the mate

(Deposition of Steven Uzdadinis.)

supervising the stowage of that, because I was on lookout at the time.

Q. And the forepeak has two general rooms, has it not? A. Yes, it has.

Q. What are they described as?

A. One is the boatswain's storeroom. There is an upper and lower, and on the upper storeroom it is divided in two. The after part of it is the carpenter shop.

Q. With reference to the boatswain's storeroom, or the carpenter shop, in which of those two rooms were the smoke bombs stowed?

A. In the carpenter shop.

Q. Do you recall the occasion of a fire which started in the forepeak while the vessel was at Attu, about July 15, 1943?

A. Yes. I was one of the first ones there after the call, or after the alarm, rather.

Q. Prior to the time that the fire was discovered what were you ordered to do with reference to a visit or a call in the forepeak?

A. I was sent up there for a couple of wrenches, and hammer or block. I just don't remember just exactly what I went up there for, but I know it was a couple of wrenches, at least.

Q. How did you go down into the forepeak?

A. I went through the only entrance there, the hatch, and went below.

Q. When you got down there, go ahead and tell exactly what [131] you did.

A. Looking for the wrenches I rummaged

(Deposition of Steven Uzdadinis.)

around there a bit in the forward part of the storeroom, or the boatswain's storeroom, and I found one. I knew I needed another, so I kept looking. At that point, when I couldn't find any more in the storeroom, I walked into the carpenter shop.

Q. Describe the general appearance of the carpenter shop, with reference to the smoke bombs and any other gear that was stowed there.

A. Well, about all that was stowed there was cases of what belonged to the amphibious crew. Half of that carpenter shop was taken up by that.

Q. Was there any change in the condition of the articles and the way they were stowed in the carpenter shop from the time they were first stowed there and the time that you were down on this occasion?

A. Well, when I first noticed them in there, that is, before this location, they were in sort of orderly condition, but this time they were stowed in more or less disorderly fashion, such as some of them in there rummaging around and taking their supplies and distributing them, or something like that. In other words, cases piled in pell mell condition, and around the deck, which they were not supposed to be.

Q. Who is responsible for the condition of the carpenter shop?

A. I suppose the carpenter is. No one else is supposed to go in there.

Q. When you went into the carpenter shop on this occasion, state whether or not there was any

(Deposition of Steven Uzdadinis.)

change in the [132] condition of the shop from what you have just described.

A. Well, when I went in there, there was no change, just the condition down there. The carpenter very seldom worked in the carpenter shop.

Q. Exactly what did you find in there, and describe it, what you saw lying around there.

A. Well, it was only those cases. They were on the deck, and one on top of another, and halfway—well, they just stood about, in a sense.

Q. Was there anything else there besides these boxes containing smoke bombs?

A. Oh, yes; the tools that they repair the guns with, and I think part of the guns were stowed in there, too.

Q. What was your purpose in going into the carpenter shop?

A. To look for another wrench, or a pair of pliers, because I knew the amphibious crew kept their tools in there, and also I thought maybe the carpenter would have some tools in there, too.

Q. In your search for the article you were looking for, state what you did.

A. I looked around, I rummaged around in those tools a bit, in the tool case, and I suppose I happened to kick the first case that was right by me, and then I left.

Q. What was in the case that you kicked?

A. Well, as far as I remember, I noticed on oc-

(Deposition of Steven Uzdadinis.)

casation before that, I looked in that case and I think there was one of the smoke bombs missing.

Q. How many smoke bombs are ordinarily carried in a case? A. I think four.

Q. How long did you remain in that room after this [133] occasion?

A. About fifteen or twenty seconds.

Q. Then where did you go?

A. I walked into the storeroom, the boatswain's storeroom, and stood there about a minute or two, I suppose, and I left.

Q. Where did you go from there?

A. From the boatswain's storeroom I went back to the No. 2 hold, and I had the gear with me. I had a wrench, and I think a hammer and pair of pliers, and I lowered them down into the hold.

Q. How did you lower them down into the hold?

A. On a heaving line.

Q. What happened while you were there?

A. Just about after I finished lowering them down I heard a call of fire, or they yelled, "Fire."

Q. How long was it after you left the storeroom?

A. I would say roughly about four or five minutes, something like that.

Q. Then after you heard this call of fire, what did you do?

A. I yelled down in the hold that there was a fire forward, in the boatswain's storeroom or the forepeak.

Q. Did you look to see where the smoke was coming from?

(Deposition of Steven Uzdadinis.)

A. I went down there, because I heard there was a fire. I heard somebody yelling, "Fire in the forepeak."

Q. They yelled, "Fire in the forepeak?"

A. "Fire in the forepeak."

Q. What did you do?

A. I rushed forward, and the first thing I did when I passed the ventilator I saw the orange smoke coming up [134] through the ventilator, and then I looked in the hatch and saw it full of smoke, and it was impossible to go below. The next thing I did, I had in mind putting out a hose, but I saw someone taking care of that already, and a few minutes after it was full of smoke, and I ran amidships to get a fire extinguisher and some breathing apparatus.

Q. Was that a so-called gas mask, or an apparatus which generates its own oxygen?

A. It has its own oxygen with it. It is an oxygen breathing apparatus.

Q. Go ahead and tell what occurred, what you saw there.

A. After I brought those back I had someone help me with that fire extinguisher. I don't know—it must have taken me a little more than five minutes or so. The first thing I saw was Lubinski come up out of the hatch, and that was all.

Q. Did you go down into the hatch?

A. No, I did not.

Q. Do you know about how long it took them to put out the fire?

(Deposition of Steven Uzdadinis.)

A. I would say they played around there——

Mr. Morrow: Was there a fire?

Q. (By Mr. Levinson—continuing): To put out the smoke, or whatever it was.

A. Well, they didn't know what it was until they finally did discover what caused it, about half an hour, I would say, altogether.

Q. Were you present when the source of the fire was discovered, or the smoke?

A. Yes, I was. [135]

Q. What was it?

A. It was a smoke bomb. They brought up a can.

Q. Can you state whether or not it was a similar smoke bomb to the one in the box which you kicked?

A. Yes, I can, because of the fact that one time when I first went down there—that is when I first did investigate them—I took one of them out and wanted to know what it was.

Q. You looked at it?

A. Yes, I did; I looked at it.

Q. Did you advise anyone at that time what you had done down in the storeroom? The answer to that is first, yes or no, and then you can explain it.

A. Well, yes, I did.

Q. Who?

A. The only one was my buddy.

Q. Did you advise anybody else?

A. No. I felt more or less embarrassed, and I

(Deposition of Steven Uzdadinis.)

thought I would be ridiculous from the fact I did such a thing, that I was the cause of it.

Q. Were you on that vessel in August 15, 1943, about a month later, when a fire occurred in one of the holds? A. Yes, I was.

Q. Did you have any duty to perform in connection with that fire?

A. Well, I did perform a duty.

Q. What was that?

A. Well, first of all I handled the hose on deck, and then I went below and I supervised the rigging up of hoses from different parts of the vessel—that is, in the [136] hold.

Q. At that fire did you observe Mr. Lubinski, the boatswain? A. Yes, I did.

Q. What was the occasion, and state what you saw.

A. I was looking into the hold at the time—there was a door right there in between deck—and I saw “Ski” coming up, and he was soaking wet. He was all wet, completely all wet.

Q. Were you in a position to observe after the first fire the condition—or did you hear any complaint from Mr. Lubinski concerning his eyes?

A. Yes, I did.

Q. What did you observe as to that matter?

A. Well, the first part of it he was complaining that something was troubling his eye, and that was all.

Q. With relation to the first fire, when did you notice the condition or hear his complaint?

(Deposition of Steven Uzdadinis.)

A. Well, I just can't exactly tell you. It must have been at least a day or so, or two days. I can't say exactly.

Mr. Levinson: You may cross-examine.

Cross-Examination

By Mr. Morrow:

Q. Mr. Uzdadinis, as I understand your story you were instructed to go down in the forepeak and find some wrenches or pliers? A. Yes, sir.

Q. And you did go in the forepeak, is that right?

A. Yes, sir; I did.

Q. That has only one entrance, has it? [137]

A. It has.

Q. That is right up in the forepeak of the ship?

A. That is right.

Q. There is a small——

A. (Interposing): Scuttle, we call it, or the booby hatch, rather.

Q. The booby hatch? A. Yes.

Q. After going into one storeroom you went in the carpenter's room? A. Yes, I did.

Q. And you couldn't find what you were looking for? A. That is right.

Q. While you were down there you didn't take one of those smoke bombs out of a box, did you?

A. No, I did not.

Q. You didn't touch one of the smoke bombs, did you? A. I did not.

Q. You did not pull the pin out of the smoke bomb, which would release the smoke?

A. No.

(Deposition of Steven Uzdadinis.)

Q. You didn't handle the bombs in any way?

A. I did not.

Q. As I understand it, all you did was to give one of the boxes a kick?

A. Well, there was one box I picked up, and I tossed it to the side a little more, and this one in particular, I just kicked it. Well, I kicked it enough so that it would move about roughly a foot, and probably went like that (illustrating). [138]

Mr. Levinson: You illustrated a sort of bouncing motion?

The Witness: Yes, I did.

Q. (By Mr. Morrow): And nothing happened when you kicked it?

A. No; nothing happened.

Q. No smoke came out?

A. No. The box was completely covered. I mean it still had its cover on.

Q. As I understand, you were down there about a minute after you did that?

A. Well, I was there in the carpenter shop about a minute, yes,—no, about fifteen or twenty seconds or so. Immediately after I kicked that I walked out of there, and then I took one more look around the forecastle.

Q. And there was no smoke coming out of there at that time?

A. No.

Q. And you went on outside up through the booty hatch?

A. Yes, I did.

Q. And in doing that you had to climb ten or fifteen steps on the ladder, I suppose?

(Deposition of Steven Uzdadinis.)

A. About that. I don't know how many there was.

Q. Something like that?

A. Something like that.

Q. So that you were probably down there in the forepeak hatch a minute or two after you left the carpenter shop?

A. Well, I wouldn't say that. Possibly about a minute, a little more than a minute.

Q. You took a look around?

A. I took one turn around there and then I walked right [139] out.

Q. If there had been any smoke in there at the time, you would have noticed it, wouldn't you?

A. Well, I don't know.

Q. Well, you didn't notice any smoke there?

A. I didn't notice anything.

Q. As a matter of fact, you thought you might have caused this?

A. Yes. I have always had that in mind.

Q. You have had that feeling? A. Yes.

Q. But there is really nothing at all which you can state which you definitely think that you definitely caused that?

A. Well, because of the fact if I kicked that, I immediately knew that there was smoke bombs in that case, and I kind of heard—or I mean I thought—I knew it was that, because I kind of heard that because the way the gas behaved, and I thought back a little before, and I remembered looking in that case, and I saw there were three of them in

(Deposition of Steven Uzdadinis.)

there instead of four, and one was missing. There may have been six, but I thought it was four in the case, so that is why I have always had the feeling that I caused it.

Q. But you do not know that any one of those bombs emitted any smoke, do you?

A. Well, yes, after they brought it up. I saw the can, and the can was exactly the type of can that I saw in that case. I knew it was a can like that.

Q. You knew it was a can like that, but you do not know [140] whether it was that particular can?

A. No, I do not.

Q. Or one of the cans in that particular case?

A. No; I don't know if it was exactly one of the cans in that particular case. It may have been the case that I tossed up. I mean I picked up a case and threw it maybe three feet away from me, upon top of another pile.

Q. Or it might have been any other can down there in the forepeak? A. Yes.

Q. That is right, isn't it?

A. Well, it could be.

Q. In other words, you do not know that you caused the gas to emit from any of those cans—you do not know it actually of your own personal knowledge, do you? A. No, I really don't know.

Q. You did not know, either, whether one of the members of the amphibious force entered the forepeak after you were there?

A. Well, I don't know, but I am sure—I always

(Deposition of Steven Uzdadinis.)

had the belief that I was the only one in that forepeak because of the circumstances involved. In other words, I did not think anyone had time enough to get up to the forepeak, or anything like that.

Q. That is what you feel and think?

A. That is what I feel and think.

Q. And not what you actually know?

A. No, I don't know, actually know it.

Q. How long have you known Mr. Lubinski?

A. Well, I have known him for the first time when I met him, when I came aboard that ship.

Q. That was the first time you had met him?

A. That was the first time I had met him.

Mr. Levinson: Your Honor, as to that next question, we object to it.

Mr. Franklin: We will omit that question.

Mr. Levinson: I move that it be stricken, that question.

The Court: It will be stricken.

Q. (By Mr. Morrow): Did you know anything about this man's physical condition before you met him?

A. Nothing whatsoever.

Q. What you knew about him you knew from what happened on board the ship?

A. That is right.

Q. So far as the complaint of his eyes was concerned, you remember that he did complain about his eyes?

A. Yes. We more or less lived together, naturally in one group there, I and the rest of the crew,

(Deposition of Steven Uzdadinis.)

and people that associated with him every day would naturally know about it.

Q. Do you recall the first time he made any complaint about his eyes, the actual time and place, and who were present?

A. Well, no, I don't recall that.

Q. You do not recall that?

A. No, I could not. That is, I could not set a definite time.

Q As a matter of fact, he made no complaint immediately [142] after this first accident, did he?

A. I couldn't say that, because in effect I didn't associate with him twenty-four hours a day. He may have said something to the nearest person to him and then forgot about it for a day or so, and then made the complaint again. That is, he didn't confide in me.

Q. As I understand the thing, you have a recollection that he did make some complaint about his eyes? A. Yes.

Q. Of course, he didn't know at the time what caused the trouble to his eyes, did he?

A. Well, I couldn't say anything about that.

Q. As I understand your testimony, the complaint of Lubinski was that he was having trouble with his eyes; that is right, isn't it?

A. Yes, that is right.

Q. As to the cause of the complaint, you had no knowledge? A. Well, we assumed——

Mr. Levinson: You cannot tell what you assumed; just what you heard.

(Deposition of Steven Uzdadinis.)

Q. (By Mr. Morrow): Of course he, himself, as I understand, made no complaint until months afterwards that there was any smoke got in his eyes; that is right, isn't it?

A. Well, Lubinski once or twice, I think we discussed the thing as to the cause of the trouble with his eyes, and there was someone else that had that trouble, and I just don't recall who it was, but we kind of thought it was from smoke.

Mr. Levinson: Was that discussed, or what you thought? [143]

A. Well, once or twice, as I recall it, we sat around the messroom at coffee time, or something like that, so we kind of figured it was from the smoke. That was about the only thing, because another fellow—well, he had trouble with his eyes, too.

Q. Who? A. I just don't know who.

Q. You do not remember who?

A. I don't just recall, but I recall the conversation.

Q. So far as you know Lubinski may have had trouble with his eyes when you first met him?

A. So far as I know he may have had and may not have had.

Mr. Levinson: That is not a fair question. Was any complaint made prior to that time?

Mr. Morrow: I am asking the questions:

Q. (By Mr. Morrow): You do not know whether he had trouble with his eyes before this first fire or not, do you? A. No, I do not.

Q. He may have had, so far as you know?

(Deposition of Steven Uzdadinis.)

A. Well, as far as I know he may have, and he may not have had.

Q. When Mr. Lubinski went down in the forepeak hatch he had a gas mask, didn't he?

A. He did.

Q. And all the other men had on gas masks?

A. Everyone that went in the forepeak had a gas mask.

Q. And those gas masks protect a man's eyes from smoke and gasses, don't they?

A. Well, I wouldn't know about that. You just put it on over your head. I think it is mostly the breathing [144]

Q. That is what it is for, isn't it, to protect you?

A. To protect you from the foul air as you breathe.

Q. Did you come in contact with the gas?

A. I did not, other than just smelling it when it was coming up through the ventilator. That is the only thing I did.

Q. It didn't have any harmful effect on you?

A. Well, I was out in the open at the time, and I just got close to it for a second or so, and that was all.

Q. It didn't have any harmful effects on you?

A. Well, as I said before it didn't have, but I got a breath of it, and that was all, and I felt it in my throat.

Q. Nobody else made any complaints, did they?

A. I think there was one person.

Q. You do not know?

(Deposition of Steven Uzdadinis.)

A. Well, I am trying to think. I am trying to be sure if it is him or not, this person, that affected his eyes. But other than that, no one else.

Q. You do not remember that? A. No.

Q. You do not remember whether anybody else had any trouble?

A. Well, I know there was another person that had trouble, but right now I just can't exactly recall, because it was not as obvious as Lubinski's.

Q. You are referring, are you not, to this conversation, or some time when there was some discussion about it, isn't that what you refer to?

A. That is right.

Q. What I am talking about is your own personal knowledge. [145] You knew of no other trouble aboard the ship on account of anybody sustaining any harm through smoke? A. No.

Q. In other words, all you have in the back of your mind now is some vague conversation, or some vague talk at some place which you do not recall, about some other person, isn't that right?

A. That is right.

Q. On this second occasion where there was actually a fire, where was that, what port?

A. That was in No. 3, in Kiska.

Q. As I understand it, at that time you stated that it was your station and you did handle a hose on deck to put out the fire?

A. That is right. That was not my particular station. In case of a general alarm I would go to my station, maybe in any part of the ship. I ran

position of Steven Uzdadinis.)

ard and saw they were putting out the hose, immediately helped to handle it, because the fire was great and one man can't handle it. After that someone told me to go below and to the small hose they had running through the quarters. They come from different directions and sometimes you have to put two together. So, you have to go through other means in order to rig up several hoses to the same hose.

On that occasion, as I understand it, you reeving Mr. Lubinski down in No. 3 hold?

I didn't see him down in the hold, but I saw when he was coming up, because when you come up the ladder—I was standing right by the door, as I said before, and [146] the door is right close to the ladder, and I was standing right there when he came up, and he came up out of the smoke, and the smoke was halfway down there so you couldn't see him. When he came up he was cussing a little bit, cetera, and he was all wet.

He had his gas mask on on that occasion?

Yes.

You didn't know on this occasion, either, whether he got any smoke or gas in his eyes, do you?

I don't know anything about that, no. I know he was in the hold and that is all.

So that neither on the first occasion nor on the second occasion have you any personal knowledge of what Mr. Lubinski got any gas or smoke in his eyes?

(Deposition of Steven Uzdadinis.)

A. Well, I am trying to think. I am trying to be sure if it is him or not, this person, that affected his eyes. But other than that, no one else.

Q. You do not remember that? A. No.

Q. You do not remember whether anybody else had any trouble?

A. Well, I know there was another person that had trouble, but right now I just can't exactly recall, because it was not as obvious as Lubinski's.

Q. You are referring, are you not, to this conversation, or some time when there was some discussion about it, isn't that what you refer to?

A. That is right.

Q. What I am talking about is your own personal knowledge. [145] You knew of no other trouble aboard the ship on account of anybody sustaining any harm through smoke? A. No.

Q. In other words, all you have in the back of your mind now is some vague conversation, or some vague talk at some place which you do not recall, about some other person, isn't that right?

A. That is right.

Q. On this second occasion where there was actually a fire, where was that, what port?

A. That was in No. 3, in Kiska.

Q. As I understand it, at that time you stated that it was your station and you did handle a hose on deck to put out the fire?

A. That is right. That was not my particular station. In case of a general alarm I would go to my station, maybe in any part of the ship. I ran

(Deposition of Steven Uzdadinis.)

forward and saw they were putting out the hose, and I immediately helped to handle it, because the pressure was great and one man can't handle it. But after that someone told me to go below and rig up the small hose they had running through the troop quarters. They come from different directions, and sometimes you have to put two together. That is, you have to go through other means in order to rig up several hoses to the same hose.

Q. On that occasion, as I understand it, you recall seeing Mr. Lubinski down in No. 3 hold?

A. I didn't see him down in the hold, but I saw him when he was coming up, because when you come up the ladder—I was standing right by the door, as I said before, and [146] the door is right close to the ladder, and I was standing right there when he came up, and he came up out of the smoke, and the smoke was halfway down there so you couldn't see deeper. When he came up he was cussing a little bit, et cetera, and he was all wet.

Q. He had his gas mask on on that occasion?

A. Yes.

Q. You didn't know on this occasion, either, whether he got any smoke or gas in his eyes, do you?

A. I don't know anything about that, no. I know he was in the hold and and that is all.

Q. So that neither on the first occasion nor on the second occasion have you any personal knowledge that Mr. Lubinski got any gas or smoke in his eyes?

(Deposition of Steven Uzdadinis.)

A. I couldn't see the smoke going in his eyes. I know he was in the hold at the time the accidents took place.

Q. But you couldn't state one way or the other as to whether he got any smoke or gas in his eyes on either occasion? A. No, I could not.

Q. You have no knowledge of that?

A. Well, no. I can't tell you anything about it.

Q. And you do not recall that he made any definite complaint? A. Yes, he did.

Q. Immediately following?

A. Immediately following—

Q. (Interposing): On either occasion. I believe it was your testimony that he did not make any complaint immediately following either occasion.

A. That is not exact. He could have made it to Mr. Levinson if he [147] was there at the time, or anybody else.

Q. That is right, but you didn't hear him?

A. Not until a day or so later, or something like that—or two days, whatever it was.

Q. As I recall your testimony on direct examination you stated that you couldn't state that definitely. I got the impression you didn't know whether it was two or three days after, or it might have been a month or two months.

A. Well, no. I know it was within a few days where I had knowledge that he had trouble with his eyes. As a matter of fact, it must have been the second day or so. But directly he didn't state any-

(Deposition of Steven Uzdadinis.)

thing to me. I mean immediately following that incident.

Q. When you speak of knowledge, aren't you referring to some talk or conversation, rather than any personal knowledge? A. No.

Q. You do not pretend to know that he got smoke in his eyes, or do you?

A. Well, I don't know if he got the smoke in his eyes or not. I know one thing, he was down there, and naturally he must have had the smoke get in his eyes.

Q. As I understood your direct examination, you knew of a complaint that he had of an ailment to his eyes, but it was unrelated to any smoke or gas, isn't that true?

Mr. Franklin: Then there is some colloquy followed by a question by Mr. Morrow on page 27.

Q. (By Mr. Morrow): As I understand your direct examination [148] the impression I got from your direct examination, you knew that he made a complaint of some ailment to his eyes; you do not recall exactly when that complaint was made, nor do you relate it to any smoke or gas on either of these particular occasions?

A. I did relate it to the gas in the first case.

Q. In the first case?

A. Yes. In the first case I related that to the gas, and as I said before—well, he didn't tell me directly the first day or the second day—it must have been about the second or third day, where it was obvious that he had trouble, and it was more than

(Deposition of Steven Uzdadinis.)

a matter of conversation amongst us. Sometimes I didn't even see the boatswain for a day or so because we work in different shifts, and I am asleep.

Mr. Levinson: Did you say different shifts?

The Witness: Yes. We work at different times.

Q. (By Mr. Morrow): You were not on the same shift as the boatswain; you didn't have the same watch? A. No, I did not.

Q. So that you had very little occasion to see him?

A. Well, I can see him most any time. The boatswain was in there at coffee time, et cetera—now, I am all “buggered” up—what I am trying to say is that he didn't tell me immediately, come up to me as if I was a doctor.

Q. You mean he didn't make any personal complaint to you?

A. Not to me. He may have made it to possibly ten other people, but not to me.

Q. He made no complaint to you personally at any time? [149]

A. That is right. As soon as it became obvious that he did have trouble, well, then we sort of discussed the matter. I mean as a group.

Q. Then if he made a personal complaint to you at any time, you would not be able to tell me, of course, what complaint he made, that is, his exact words to others.

Mr. Levinson: That is argumentative.

Q. (Br. Mr. Morrow): You do not know what his actual complaint was to others, do you?

(Deposition of Steven Uzdadinis.)

A. Yes, I do, to others. It was not only I knew that he had that trouble with his eyes—I mean I even questioned him on it, what he thought it was, and he said it must have been that smoke up in the forepeak.

Q. Then you did have a conversation with him?

A. Sure, but a day or so later, or two days later, or three days.

Q. Where did you have the conversation?

A. I cannot say. It must have been in the mess room, or it may have been in his room.

Q. What did you say and what did he say?

A. Well, I just wanted to know how he felt, and what-not. I can't say what I said and what I didn't say, or what he said.

Q. What did he say?

A. I know this much, that he related it to the smoke in the forepeak.

Q. You do not recall what he said?

A. No; I don't even recall what I said.

Mr. Morrow: That is all. [150]

Mr. Levinson: Just one other question. When you went in the forepeak to get this wrench, was there anyone else there?

The Witness: No one was there.

Mr. Levinson: That is all. Do you waive reading and signing your deposition, Mr. Uzdadinis?

The Witness: Yes.

Mr. Morrow: And we waive signature.

(Deposition concluded)

Mr. Levinson: I am offering the deposition of Mr. Uzdadinis in evidence, your Honor, as his testimony.

The Court: His testimony is received in evidence as a part of the Libelant's case.

Mr. Levinson: I next wish to read the deposition of Peter Corvia, your Honor. This deposition was taken in San Francisco on December 16, 1944, at which Mr. Edward R. Kay, of the office of John Black, appeared as proctor for Respondents, and Mr. Albert Michelson appeared on my behalf.

PETER CORVIA,

a witness called on behalf of the libelant, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, nad nothing but the truth, testified as follows:

Direct Examination

Mr. Michelson:

Q. What is your name?

A. Peter Corvia. [151]

Q. Where do you reside?

A. 1615 Bridge Avenue, Oakland, California.

Q. What is your occupation?

A. Seaman.

Q. Do you expect to be in the State of Washington in the near future?

A. I don't think so.

Q. You spend your time going to sea?

A. Yes.

(Deposition of Peter Corvia.)

Q. And you expect to leave within the next few days? A. Pretty soon; very shortly.

Q. How long have you been going to sea?

A. About 12 years.

Q. In what capacity do you go to sea?

A. Able seaman.

Q. During the year 1943 were you a member of the crew of the SS George Flavel?

A. Yes, I was.

Q. Do you remember when you went to work on that vessel in 1943?

Have you any objection to his referring to his discharge, Mr. Kay?

Mr. Kay: No.

Q. (By Mr. Michelson): Have you your discharge there?

A. I haven't got it with me. It was somewhere around July, if I remember right.

Mr. Kay: Pardon me. What was the previous question?

(Record read)

Q. (Mr. Michelson): Was it somewhere around the first of July? A. I think so, yes.

Q. And up to what time, approximately, if you remember?

A. Late September or the early part of October, if I remember right.

Q. Do you know Walter Lubinski?

A. I do.

Q. Was he on that vessel while you were on the vessel? A. He was.

(Deposition of Peter Corvia.)

Q. What was he doing on the vessel during that time? A. He was boatswain.

Q. What ports did the vessel touch upon on that voyage to the best of your recollection?

A. Attu.

Q. Where is that?

A. In the Aleutian Islands.

Q. Where else?

A. Adak, in Alaska, and Kiska, and Nome. There were some other places, but I don't remember the names of them.

Q. Do you recollect any occurrence while you were on that vessel in the forepeak of the vessel when smoke came out of that forepeak?

A. Do I what?

Q. Do you recollect any occurrence when smoke poured out of the forepeak of the vessel?

A. I don't get what you mean. I was down in the hold when that happened—you know, when the fire happened.

Q. I am speaking of the forepeak, when the vessel was at Attu. Do you remember anything unusual that occurred that day?

A. Well, there was a fire in the forepeak.

Q. What was the first you knew of that fire?

A. Well, I was down in No. 2 hold with the boatswain and a couple of more fellows when somebody cried down, "Fire froward."

Q. What happened then?

A. Well, the boatswain told us to drop what

(Deposition of Peter Corvia.)

we were doing and get up forward as fast as we could.

Q. Get forward on what deck?

A. To get forward where the fire was. You see, we were down in the hold when the boatswain told us to drop everything we were doing and go forward to the fire.

Q. Did you go?

A. We all went right away.

Q. Who do you mean by "all"?

A. Well, the boatswain and myself and a couple of other fellows who were working there.

Q. Who was the boatswain?

A. Lubinski.

Q. When you got up to the forepeak what did you see there?

A. Well, a big mass of orange smoke.

Q. What kind of smoke?

A. Orange smoke from one of those smoke bombs.

Q. Where was the smoke coming from?

A. It was coming out of the forward storeroom.

Q. That is located in the forepeak, is it?

A. In the forepeak, yes.

Q. Was Lubinski there at the time?

A. He was right there, yes.

Q. What did Lubinski do?

A. Somebody handed him a mask, and he went right down right away. [154]

Q. Did he have the mask on when you arrived there?

(Deposition of Peter Corvia.)

A. No, somebody handed it to him when we got up there.

Q. And who put it on?

A. I helped him and another fellow. We were all excited, and I don't know who the heck the other guy was.

Q. Did Lubinski help put it on himself.

A. Oh, yes.

Q. Then what did he do?

A. Well, he went right down.

Q. Did you remain in that vicinity?

A. For a few minutes, yes.

Q. Did you again see Lubinski?

A. I seen him when he came up, yes.

Q. How long was it between the time you saw him go down and the time when he came up?

A. It must have been around several minutes or so.

Mr. Kay: Pardon me. What was your answer?

A. It must have been several minutes or so.

Q. (Mr. Michelson): Did you see him go down?

A. Yes, I seen him go down.

Q. Right into the forepeak?

A. That is right.

Q. Where were you watching?

A. I was watching right at the hatch there.

Q. What is that—a hatch opening? Just describe it a little bit.

A. It is a square hatch opening where they store all the ship's stores and ammunition there.

(Deposition of Peter Corvia.)

Q. Did you watch him go down?

A. I did, yes. [155]

Q. What did he use to go down?

A. There is a ladder that runs up and down there. He went right down there.

Q. When Lubinski came up what did he do?

A. Well, he came up, and he took his mask off to get some air. The smoke, you know, was pretty bad; and as I remember he had it all over his face. You know, that stuff clings to you. And we rushed him over to the side to get some air.

Q. What was the stuff you say he had all over him?

A. It was the flare from the smoke bomb, or whatever it is.

Mr. Kay: What did he say?

A. The flare of the smoke bomb.

Q. (Mr. Michelson): Tell me what you saw about him, or that he had on him?

A. Well, that stuff was all over him. It just seemed to settle on him.

Q. What color was it?

A. From my recollection it looked like it was orange.

Q. Did you look down the hatch?

A. Yes.

Q. Did you have any of that on you?

A. Yes, I did.

Q. What did it come from, if you know?

A. The smoke?

Q. What was it that came up and got on you?

(Deposition of Peter Corvia.)

A. The smoke from the flare

Q. The smoke from the flare? A. Yes.

Q. And was it orange colored, did you say?

A. Yes. [156]

Q. Then did you see Lubinski with his mask off after he came up?

A. Oh, yes; I helped take it off.

Q. On what part of him was that orange colored stuff? A. It was all over him.

Q. Do you mean on his clothes or body?

A. All over his face, hair, neck, and all on top around here (indicating).

Q. Where did you have it on you?

A. Well, it settled all around me. I got a little bit myself from helping him go down there.

Q. Where was it on you?

A. I got some of it down my throat. I inhaled it. I couldn't help it.

Q. Did any of it get on your clothing?

A. Yes, some of it got on my clothing.

Q. Did Lubinski complain of any pain or anything of that kind?

A. Well, sure. It got all over his eyes and face, and he said how it started to burn; his face burned, and his eyes started to water there.

Q. How long were you with Lubinski after he came up from the forepeak?

A. It wasn't very long. I went down to see the doctor myself. I got a mouth full of that stuff myself, and I was gagging.

(Deposition of Peter Corvia.)

Q. How long did you remain with him before you went down to the doctor?

A. It wasn't long.

Q. A minute?

A. A couple of minutes, I guess. [157]

Q. A couple of minutes? A. Yes.

Q. What did you notice about the condition of his eyes?

A. Well, his face was all full of that smoke there. It looked kind of bad.

Q. What do you mean it looked bad? Say what you noticed, or what you saw.

A. Well, you could notice his eyes.

Mr. Kay: Pardon me. You say his eyes were what? Would you read that part of it to me?

(Record read)

Q. (Mr. Michelson): What was it you could notice?

A. You could notice they were all bloodshot.

Q. And what else did you notice about them?

A. Well, also his face. It started drooling down, you know, like water.

Q. Drooling down like water?

A. Like a guy is crying, and there were tears.

Q. The tears were what?

A. The tears were coming down his face?

Q. The tears were coming down his face?

A. Yes.

Q. Did you see him afterwards on the voyage?

A. Oh, yes sure.

(Deposition of Peter Corvia.)

Q. How often would you see him?

A. I would see him every day.

Q. And was he on the vessel with you until you left the vessel? A. Absolutely.

Q. And you left the vessel about October 1st?

A. Something around there.

Q. After you went down to the doctor yourself you saw him frequently the rest of the voyage, did you? A. Do you mean the doctor?

Q. No. You saw Lubinski frequently the rest of the voyage, did you? A. Oh, yes.

Q. What was the condition of his eyes during all the rest of that time you were on the vessel?

A. His eyes were pretty bad. They were always bloodshot. He always had to have a handkerchief or a piece of rag to his eyes.

Q. What was he doing with the handkerchief or rag?

A. His eyes were always wet, you know, from bloodshot and sore, I guess.

Q. Do you mean watery?

A. Watery, that is it, yes.

Q. Did you see him go to the doctor there?

A. Oh, yes.

Q. How often would he go to the doctor?

A. He started going twice every day that I know of. That was only a couple of weeks that I know of. I don't know how long it was after that.

Q. Now, do you remember an unusual occurrence that happened at Kiska on that vessel?

A. Yes.

(Deposition of Peter Corvia.)

Q. What was that occurrence?

A. Well, we had another fire.

Q. Where was that fire?

A. No. 3 lower hold. [159]

Q. What was the first you heard about that fire?

A. Well, I was in the mess room having coffee when the call came down.

Q. About what time of the day was that?

A. Around 10:30 or 11:00 o'clock, I guess.

Q. What was the call you heard?

A. Fire No. 3 foreward.

Q. What did you do?

A. We ran up there right away.

Q. You ran up to where?

A. Up to No. 3 hold.

Q. You mean——

A. Up to the scene of the fire.

Q. Up to the hatch? A. That is right.

Q. You weren't down in the hold, were you?

A. No, I wasn't.

Q. What was going on there when you arrived?

A. I heard somebody yelling down in the hold there, and so I ran over there and a couple of mess boys had a hose there—had the nozzle right down on this guy that was yelling.

Q. What was coming out of that hose?

A. A full pressure of water was coming out.

Q. Did you look down the hold then?

A. Yes, I looked down.

Q. What did you see?

(Deposition of Peter Corvia.)

A. I seen the boatswain down there screaming his head off.

Q. Where was the boatswain?

A. He was on the ladder coming up. [160]

Q. And when you looked down what did you see with reference to the stream of water and Lubinski?

A. Well, as soon as I heard him yell, and seen who it was—I recognized him—and I wanted to see if he was all right. He had this mask all over—it was falling off of him, you know; it was lopsided.

Q. Where was the stream of water striking him when you first looked down there?

A. Right full force on him.

Q. On what part of his body?

A. Right on his face.

Q. And what was the position of the mask with reference to his face?

A. Well, it was practically knocked off of his face.

Q. Was it still hanging on him?

A. It was hanging on him, yes.

Q. Then what did you do?

A. I told the mess boys to give me the nozzle and get behind me and just hold the weight of the hose, and I pointed the water right over on the fire.

Q. Were those mess boys able to control that hose? A. Oh, no, it was impossible.

Q. Now, what did Lubinski do?

A. When he came up on deck?

(Deposition of Peter Corvia.)

Q. I say what did he do? A. Well——

Q. He was on the ladder? A. Yes.

Q. Now, you got ahold of the nozzle of the hose, and then what did he do? [161]

A. He came up on deck.

Q. He came up on deck? A. Yes.

Q. What happened then?

A. He started blowing his top, which you can't blame the guy.

Q. What do you mean by "blowing his top"?

A. He got mad, and he wanted to know who had the hose on him.

Q. Was the master of the ship around there?

A. Oh, yes, he was.

Q. What was he doing?

A. He was screaming for more pressure on the hoses, and trying to give directions for the fire.

Q. Was he looking in the hold while you were there? A. Oh, yes, all of the time.

Q. Was he looking down there at the time the mess boys had the hose pointed down and the stream from it was hitting Mr. Lubinski?

A. I couldn't say, but I guess so, because the bridge looks right down into No. 3 hold.

Q. I am going to refer back for a minute, Mr. Corvia, to the occurrence of the smoke and the fire in the forepeak at Attu. I believe you have testified that some of this got on your body?

A. Yes.

Q. What effect did that have upon you?

(Deposition of Peter Corvia.)

A. Well, it burns you. You rub it and it burns and it stings.

Q. Was that a burning or a stinging sensation?

A. Stinging.

Q. How long did that last with you? [162]

A. Oh, I don't know. I couldn't say now how long it lasted on me.

Q. I mean was it a few minutes or a long period of time?

A. Oh, yes, it was quite a while.

Q. You inhaled some of it, I believe you said?

A. Yes, I inhaled some of it.

Q. What did the doctor tell you to do for it?

A. I went to see the doctor, and he said there was nothing to do but just to go out and get plenty of fresh air.

Q. And you got over that all right, did you?

A. Eventually, yes.

Q. What was the condition of Mr. Lubinski's eyes after the fire in the hold—that is, after he came up on deck, and from then on on the voyage?

A. I would say it was pretty bad. He was always having trouble.

Q. What do you mean by pretty bad?

A. They were always bloodshot, and watery, and he always had to have attention for them.

Mr. Michelson: That is all.

Cross Examination

Q. (Mr. Kay): Do you remember what day the fire occurred—that is, from the smoke signals?

(Deposition of Peter Corvia.)

A. No, I couldn't remember that.

Q. Do you remember what part of July that was?

A. Well, let's see. It might have been about the third week of July.

Q. And how long after that was the second fire that you testified about in No. 3 hold? [163]

A. That is pretty hard to say.

Q. Well, about how long would you say it was?

A. I guess it was a good month anyway.

Mr. Kay: What was the answer?

(Witness' answer read.)

Q. Now, you say that you were down in No. 2 hold when someone yelled "Fire," and you were there with the boatswain and a couple of other fellows. Who were the other fellows?

A. Two sailors.

Q. A. B.'s? A. All A. B.'s.

Q. By the way, how old are you? A. 30.

Q. 30? A. Yes.

Q. You said you had been going to sea for twenty years?

Mr. Michelson: No, he didn't say twenty years. He said twelve years, counsel.

Q. (Mr. Kay): Did you?

A. Twelve years.

Mr. Kay: I am sorry.

Q. Now, these other fellows you referred to—were there two or more?

A. There was the boatswain, and three A. B.'s

(Deposition of Peter Corvia.)

counting myself, and some longshoremen, but they weren't part of the crew.

Q. In other words, there were two other sailors besides yourself? A. Yes. [164]

Q. Were they A. B.'s or were they ordinary seamen, or do you know?

A. They were all A. B.'s. That ship doesn't carry ordinary seamen.

Q. Do you know their names?

A. Let's see. One was Steve Devinis, but I don't know how to spell it.

The Reporter: D-e-v-i-n-i-s?

A. I don't know how to spell it.

Q. (Mr. Kay): Something like that?

A. Yes.

Q. And who was the other fellow?

A. Another—Bud Kinney.

Q. What did you say? You said "another"—something.

A. No, I didn't say nothing. You will have to excuse me. I have a bad cold.

Q. I know you have a bad cold.

A. I said Bud Kinney.

Q. Then you said something before that.

A. No, I didn't.

Mr. Kay: All right.

Mr. Michelson: I didn't hear him say anything.

Mr. Kay: Yes, he said "another"—something.

A. I was going to probably say "another sailor".

(Deposition of Peter Corvia.)

Q. Did you and the boatswain and these two sailors all go up to the forepeak then?

A. We did, yes.

Q. How did you go up?

A. Up the ladder.

Q. Which side of the vessel did you go up? [165]

A. I went up the port side.

Q. The port side? A. Yes.

Q. And directly to the forepeak?

A. That is right.

Q. And who was there, if anybody, when you arrived?

A. Well, some longshoremen and the chief mate.

Q. Any others?

A. There were, but I can't remember who they were.

Q. Of the crew I mean?

A. I don't remember.

Q. Do you know where these smoke bombs were?

A. In the forepeak before this fire. I never even knew they had any.

Q. You didn't know until that moment when you went up there and someone said there was a fire there? A. That is right.

Q. How did you know they were smoke bombs, then?

A. You could tell by the what-you-may-call-it. I seen them used before, you know.

Q. You never had anything to do with the forepeak or that part of the ship before this fire?

A. No.

(Deposition of Peter Corvia.)

Q. Did you ever go down into that part of the ship?

A. After we left Attu I did, yes; after Attu I stood look-out watches.

Q. How long had you been on this ship before the fire happened—about two weeks?

A. Yes.

Q. You had no occasion prior to the fire to go down there? [166]

A. No.

Q. After the fire did you look down and see where these smoke bombs were stowed?

A. I didn't go down there at all after the fire.

Q. Did you look down?

A. Oh, sure, you could see the smoke come up.

Q. After the smoke cleared did you look down?

A. I wasn't there after the smoke cleared.

Q. So you don't know where these bombs were stowed in the forepeak?

A. No.

Q. Could you tell from which side the smoke was apparently coming from?

A. I couldn't tell that.

Q. Which side of the hatch to the forepeak did you look down?

A. Which side of the hatch to the forepeak?

Q. Yes; did you look down into the hold when the smoke was coming out?

A. Yes.

Q. That is, into the forepeak?

A. I didn't look long; you couldn't look long that day.

Q. How big a hatch opening is it?

(Deposition of Peter Corvia.)

A. Well, I will say maybe around two by four, I guess.

Q. Did you stand directly above that opening and lean over?

A. No, I just looked down. I had to hold on to the brace of the gun mount to look over.

Q. And you stood there how long?

A. Not long. Just like that (witness snaps fingers).

Q. What did you do after that? [167]

A. I did this when the boatswain was going down, you know—after he went down.

Q. What did you do after that?

A. I got out of the way.

Q. How long was the boatswain down there?

A. Several minutes, I guess. It is hard to say.

Q. Did anyone else go down with the boatswain?

A. I don't know; I don't remember.

Q. Did anyone else come up with the boatswain?

A. I didn't see nobody.

Q. So far as you remember the boatswain was the only one who went down and came up?

A. While I was there.

Q. And how long was that, then?

A. What do you mean, how long?

Q. How long a period was that that he went down and came up?

A. I guess about several minutes.

Q. Before this fire occurred had you been up on deck near the forepeak—that is, within an hour?

A. No, not me.

(Deposition of Peter Corvia.)

Q. At that time—that is, for an hour before the fire you were down in No. 3 hold?

A. No, this was No. 2 hold.

Q. No. 2 hold? A. Yes.

Q. This Steve that you are talking about, was his name Steve Uzdadinis? See if this refreshes your memory as to his name, Steve U-z-d-a-d-i-n-i-s—does that sound like his name—Steve Uzdadinis?

A. Yes, that sounds right. It was something like that.

Q. By the way, what were you and Steve Uzda-dinis and the boatswain doing in this hold before the fire?

A. We were overhauling the jumbo wire.

Q. Jumbo wire? A. Yes.

Q. When did you start working on that—I mean how long before the fire would you say it was?

A. Oh, a couple of hours.

Q. A couple of hours? A. Yes.

Q. So that you, Steve, Bud Kinney and the boatswain were down there a couple of hours before the fire?

A. Yes.

Q. And you worked there all that time?

A. Yes.

Q. None of you went up to the forepeak before that and to the place where these bombs were stowed?

A. I don't know; I couldn't say if anybody went there. I don't watch everybody to see where they go.

Q. No. I mean you and Steve, for instance,

(Deposition of Peter Corvia.)

were working together there on this equipment, weren't you?

A. If I remember right somebody went up to get some tools, but I don't know who it was, though.

Q. You don't know who it was? A. No.

Q. How long before the fire was that?

A. I don't know.

Q. I mean was it an hour?

A. Oh, it would be an hour. [169]

Q. It would be at least an hour before the fire?

A. Oh, yes.

Q. Now, when this fellow went up there to get some tools, did he say where he was going?

A. No, he didn't say.

Q. Who told him to get a tool or tools?

A. If it would be anybody it would be the boatswain.

Q. Well, do you remember, or are you just guessing at it?

A. I know somebody was going to get the tools, but I don't know who told him, but it would only be a common thing that the boatswain would tell him.

Q. How long was he gone for these tools?

A. Well, it wasn't long—a few minutes, I guess.

Q. A few minutes? A. Five at the most.

Q. Five minutes at the most? A. Yes.

Q. And then he came back and you went on about this work? A. That is right.

Q. And then about an hour later someone yelled "Fire," and you all went up forward, is that right?

(Deposition of Peter Corvia.)

A. Yes, it was about that.

Q. About how long did it take you to go up to the forepeak from where you were working when someone yelled "Fire"?

A. It didn't take more than three minutes.

Q. And then you went up there and the boat-swain went down immediately, did he?

A. No, he put a mask on first.

Q. How long did that take?

A. That took about a couple of minutes or longer. [170]

Q. And then he went right down?

A. He went right down.

Q. And you said he was there about four or five minutes?

A. Well, about several minutes.

Q. About seven minutes?

A. About several minutes.

Q. Well, less than ten minutes you would say?

A. Well, I couldn't say.

Q. I mean was it half an hour?

A. Oh, no.

Q. It was somewhere between five and ten minutes? A. It could be, I think.

Q. Did he have anything with him when he came up? A. No.

Q. He didn't bring this bomb up with him?

A. Oh, no.

Q. Did he have his mask on when he came out of the hatch opening? A. Sure.

Q. And you helped him take the mask off?

A. That is right.

(Deposition of Peter Corvia.)

Q. When you took the mask off you saw this smoke all over his face you say?

A. All over him, yes.

Q. And that area that the mask was on also had smoke on it? A. Yes, sure.

Q. Well, did the smoke lay on his face?

A. You know, it just clings to you.

Q. Well, was it wet? A. Sure, it was wet.

Q. Wet smoke, is that so?

A. No. Right where his mask was it was all damp.

Q. Smoke ordinarily doesn't lay on anything, does it?

A. Smoke don't? Well, this smoke does.

Q. It does? A. Yes.

Q. Was it kind of sticky?

A. Well, the wet I guess was from the tears from his eyes.

Q. Did you see some sticky substance on his face? A. No.

Q. You just saw the smoke laying on there?

A. Yes.

Q. An orange smoke? A. Yes.

Q. How long did it lay on his face after he took the mask off? A. I don't know.

Q. You were there, weren't you?

A. Yes. I was only there for about a couple of minutes after he came up.

Q. Then you helped him take the mask off?

A. That is right.

Q. You saw this smoke hanging on his face?

(Deposition of Peter Corvia.)

A. That is right.

Q. How long did it stay on his face?

A. I don't know.

Q. How long did you watch it?

A. I was only there for about a minute or two, and then I went down to the doctor.

Q. During the minute or two you were there the smoke didn't leave his face? [172]

A. We went to the side to get some air.

Q. Did the smoke come off his face by that time? A. No, it couldn't.

Q. It just stuck there?

A. That stuff, you have to brush it off.

Q. Had the smoke stopped coming out of the hatch when Lubinski came up? A. No.

Q. It was still coming out?

A. That is right.

Q. When you took this mask off Lukinski's face what did he say, if anything?

A. He was more gagging than anything.

Q. Did he say anything?

A. He didn't say much. He was gagging.

Q. What did he say?

A. He said, "It's a bastard down there."

Q. Did he complain about his eyes?

A. We ran him over to the side there, and he said, "Christ, my eyes burn like a bastard."

Q. After you rushed him over to the side what did you do?

A. I started spitting out what I had in my throat.

(Deposition of Peter Corvia.)

Q. Then you left? A. That is right.

Q. What doctor did you see?

A. The ship's doctor—the army doctor.

Q. Do you know his name?

A. I did know his name.

Q. Where did you see him?

A. I went down to the dispensary that they have on the ship. [173]

Q. And this doctor was there?

A. That is right.

Q. Did Lubinski go down there with you?

A. He didn't go down with me, no.

Q. While you were there were any other men being treated or examined by the doctor?

A. No, I believe I was the first one there.

Q. Have you given a statement concerning this occurrence to anybody—a written statement?

A. Not me, no.

Q. Have you talked over your testimony before you came here today? A. Not me, no.

Q. Did you discuss this case with Mr. Lubinski's attorney, Mr. Levinson?

A. I don't even know who the man is.

Q. Did you discuss this case with Mr. Michelson before your testimony was given this morning?

A. This morning?

Q. Yes. A. No.

Mr. Michelson: He means did you discuss it with me before?

Mr. Kay: He knows what I mean.

(Deposition of Peter Corvia.)

Mr. Michelson: You said "this morning," and he said "No."

Mr. Kay: Yes.

Q. You understand my question, don't you?

A. You said "this morning," didn't you?

Q. Yes. This morning before you testified, and before you [174] were put under oath, did you discuss your testimony, and the facts of this case that you know about, with Mr. Michelson?

Mr. Michelson: At any time you mean?

Mr. Kay: At any time before this occasion.

A. Yes, I did.

Q. When?

A. Oh, this was—let me see—there was a call down at the hall for me to come up to see Mr. Michelson. When the heck was that? I don't know. That was I think a little after—it was about a couple of months ago, I guess.

Q. You were here a couple of months ago?

A. That was when I first found out about the case.

Q. And did you discuss the facts of the case at that time with Mr. Michelson?

A. I just told him what I knew.

Q. And that was a couple of months ago?

A. Yes.

Q. And was that the only time you discussed this case with Mr. Michelson?

A. That is the only time I know of.

Q. And you haven't discussed it with anyone else?

A. No.

(Deposition of Peter Corvia.)

Q. Did you talk to Mr. Flavel about it?

A. Who is Flavel?

Q. Well, that is the man who is suing here.

Mr. Michelson: No, don't confuse the witness.

Lubinski is the libelant.

Mr. Kay: I beg your pardon. That was the name of the vessel. Walter Lubinski I mean? [175]

A. No, I never seen him but once after that.

Q. When was it that you saw him?

A. Oh, it was long ago. I can't remember.

Q. How long after you left the vessel was it?

A. I don't know.

Q. Was it a year, or a month, or a short time afterward?

A. Yes, it was a short time before I left. I can't remember the last ship I made before I seen him.

Q. The second fire that occurred, and which you say was in No. 3 hold, that was at Kiska, was it?

A. That is right.

Q. That was during the time they were invading Kiska, wasn't it?

A. That was the same day.

Q. The same day? A. Yes.

Q. And the troops who were aboard the vessel were going ashore and also taking equipment from this vessel? A. That is right.

Q. By the way, did you talk to Uzdadinis about this first fire after it happened? A. Steve?

Q. Steve. A. No, I never talked to him.

Q. You never did talk to him? A. No.

(Deposition of Peter Corvia.)

Q. Where were you when this second fire started? A. I was in the mess room.

Q. And someone yelled "Fire," and you went over to the No. 3 hold? [176]

A. They yelled "Fire in No. 3 forward," yes.

Q. And the captain you say was there?

A. He was on the bridge.

Q. Oh, he was on the bridge? A. Yes.

Q. How far is that from the No. 3 hold?

A. You can look right down into No. 3 hold.

Q. Do you know the names of these two mess boys that were holding the hose?

A. I never even knew the names of any of them on the ship.

Q. Were there any other members of the crew there at the time you arrived?

A. They were around the hatch, yes.

Q. Able seamen?

A. Let me see. There were two forward rigging up another hose; in fact looking for an extension.

Q. Two seamen? A. That is right.

Q. And who were they?

A. Well, I know the name of one of them, but I don't know the other guy's name.

Q. Well, what is the one fellow's name?

A. One fellow's name is "Smoky" or "Smoke."

Q. Who else was around there?

A. Well, you had all departments around there. The boatswain was there. Those that didn't go

(Deposition of Peter Corvia.)

down into the hatch had to stand around with the hose.

Q. About how many members of the crew were around No. 3 hold?

A. I would say at least twenty. [177]

Q. At least twenty? A. Yes.

Q. What were they all doing? You say two mess boys were handling the hose. What were the rest of the crew doing other than those two mess boys?

A. The most of them were running around in circles.

Q. Running around in circles?

A. That is right, the way I figure.

Q. And when you got there you took the hose from the mess boys? A. Yes, sure, I had to.

Q. And the other men just stood there and let the mess boys pour water on Lubinski, is that right?

A. Sure. They didn't do it intentionally. They couldn't help it.

Q. These other fellows just stood by?

A. They were just standing by waiting for these other hoses to be rigged up, you know. You have to wait so long for them to get rigged up.

Q. How many men were down in the hold at the time of the second fire when you got there?

A. Let's see. I would say about five.

Q. When you took the nozzle from the mess boys you pointed it away from the boatswain, is that right? A. I put it right on the fire.

(Deposition of Peter Corvia.)

Q. Yes. And you said the mess men weren't able to control the hose. Do you mean before you took over?

A. That is right.

Q. But you didn't have any trouble in controlling it?

A. Not with them holding the weight of it. [178]

Q. Did you have any trouble with your eyes after this first occasion when you say you got some of this smoke from the smoke bomb in your eyes or in your face?

Mr. Michelson: I don't think he said he got any in his eyes.

A. I said I inhaled mine.

Q. (Mr. Kay): But it didn't bother your eyes?

A. No, not mine.

Q. Do you know of any other fellows who had trouble with their eyes as a result of this smoke from the smoke bomb?

A. They didn't say nothing to me about it.

Q. Where did you sign on this vessel, Mr. Corvia?

A. I am trying hard to think. I think it was around the first of July.

Q. No. Where did you sign on?

A. Oh, in San Francisco.

Q. About what time was this first fire—that is, in the forepeak—what time of the day?

A. I guess it would be around 11:00 in the morning, if I remember right.

Q. About 11:00 in the morning? A. Yes.

Q. Before lunch? A. Yes.

(Deposition of Peter Corvia.)

Q. At the time this fire started was any loading being done or unloading in the No. 2 hold where you were working?

A. The longshoremen were loading and unloading the hold, and they had a little trouble with the jumbo wire—the jumbo purchase; and from then on we took over and helped to straighten it out.

Q. Where were you doing this repair work—in the hold? A. In the lower hold, yes.

Q. And just what were you doing with this jumbo wire?

A. Taking the turns out of the jumbo purchase.

Q. In addition to the regular crew of the ship there were a number of armed forces aboard that vessel at that time weren't there?

A. Well, I don't remember.

Q. You don't remember there being any members of the armed forces aboard that vessel at that time? A. What do you mean—troops?

Q. Yes. A. They got off.

Mr. Michelson: Do you mean army or navy personnel?

Mr. Kay: Army or navy.

A. Oh, yes, they had the armed guard.

Q. I mean besides the armed guard?

A. They had the army medics.

Q. Well, I mean other than army doctors weren't there some troops aboard?

A. Well, that is the army medics—the medical department.

(Deposition of Peter Corvia.)

Q. The medical corps?

A. Medical Corps.

Q. By the way, what tools did this man come back with who had gone for them?

A. Well, Stillson wrenches, spikes and some grease and a hammer.

Q. In other words, he had quite a few things with him.

Mr. Michelson: Just a minute. That is calling for a conclusion of the witness. He stated what they were. [180]

Q. (Mr. Kay): How did he bring these tools back with him? Did he carry them all by himself?

A. When you go for tools like that you usually drop them down into the hold on a line.

Q. I don't want what you usually do. What happened on this occasion?

A. The same thing.

Q. He lowered all these things down into the hold on a line, is that right?

A. Yes.

Q. And no one else went with him to get these tools?

A. No.

Q. While he was gone what were you doing?

A. We managed to take out some of the turns, you see, and we were just standing by waiting. It didn't take long before he was back.

Q. About how long would you guess?

A. About five minutes.

Q. Did the boatswain—that is, Lubinski—go down there voluntarily to see about this smoke in the forepeak?

(Deposition of Peter Corvia.)

A. To my knowledge he was sent down by the mate.

Q. Did you see the mate there?

A. Yes, sure, the mate was there.

Q. Did you see the mate there?

A. Yes, sure, the mate was there.

Q. Did the boatswain go down there just that one time while you were there?

A. While I was there, yes.

Q. And you saw no one else go down?

A. I didn't, no. [181]

Q. What was done at this forepeak when you were there other than the boatswain going down? Was there anything done in an attempt to put out the fire?

A. They were getting the fire hoses rigged up, and then fellows were trimming the ventilators.

Mr. Michelson: Which fire do you refer to?

Mr. Kay: I am talking about the smoke bomb fire.

Mr. Michelson: In the forepeak?

Mr. Kay: Yes.

Q. You say some others did go down?

A. No, I said some were stretching the hoses. They always do that.

Q. Did they put water into the forepeak?

A. No, they were all waiting for the mate.

Mr. Michelson: What was that answer?

(Witness' answer read.)

Q. (Mr. Kay): Altogether then how long were you around the forepeak?

A. Me?

(Deposition of Peter Corvia.)

Q. Yes.

A. I would say fifteen or twenty minutes.

Q. And during all of that time no water was put down there?

A. Well, they were trying to find the source of the fire.

Q. Well, just answer the question. During all of that time no water was put down there?

A. Oh, no.

Q. And during all that time you saw no one else, except Lubinski, go down there?

A. I didn't, no.

Q. You didn't see Lubinski go down other than on this one [182] occasion and come out?

A. I didn't.

Q. Did you get there at the same time that the boatswain got there—Lubinski? A. Yes.

Q. What did Bud Kinney do while this was going on? A. I can't remember.

Q. He didn't go down there?

A. I don't know.

Q. You didn't see him go down?

A. I didn't.

Q. What kind of a mask was this, if you know? Was it a regulation army gas mask?

A. Yes.

Mr. Michelson: This is at the forepeak you refer to?

Mr. Kay: Yes.

Q. I am referring to the gas mask you helped put on Lubinski's face at the forepeak?

(Deposition of Peter Corvia.)

A. It was an old army gas mask.

Q. You couldn't see anything defective about the mask, could you? A. No.

Q. When you put it on or took it off you didn't see anything defective about the mask, did you?

A. No.

Q. Nobody complained about the gas mask being defective? A. Well, I don't remember.

Q. After this fire in the forepeak did you have occasion to go down in there at any time?

A. Me? [183]

Q. Yes. A. I never went down.

Q. I mean at any time at all from that time until the time of the second fire?

A. Oh, yes, sure.

Q. How long after this first fire did you go down into the forepeak?

A. After they cleaned it out.

Q. How long would that be?

A. Oh, I would say about three days.

Q. And you didn't look down there during that time, did you, while they were cleaning it out—during this three day period?

A. While they were cleaning it out, no.

Q. You didn't go down there during that time?

A. No.

Q. When you went down there after this cleaning had been done what did you see down there?

A. Nothing.

Q. It was all clear? A. That is right.

(Deposition of Peter Corvia.)

Q. Where is the magazine locker with reference to the carpenter shop in this forepeak?

A. It is pretty close to the carpenter shop.

Q. And on which side of the vessel—port or starboard?

A. I am just trying to think. If I remember right it was right amidship of the storeroom.

Q. The magazine locker? A. Yes.

Q. And where would the carpenter shop be?

A. Well, it wasn't much of a carpenter shop. It was right next to it.

Q. On which side?

A. I can't remember now.

Q. Did you ever see one of these bombs that was stowed in the forepeak? A. Not them, no.

Q. Did you ever have occasion to see Lubinski again after you went to the doctor—that is, on that same day?

A. Yes, I seen him later on in the day.

Q. How long after this affair?

A. After lunch.

Q. About an hour or so after the fire?

A. About two hours after.

Q. About two hours afterward? A. Yes.

Q. At that time did you notice the condition of his eyes? A. Yes, I did.

Q. What did you notice?

A. They were pretty bad. They were bloodshot.

Q. They were bloodshot? A. Yes.

Q. Swollen, were they?

A. I didn't notice them swollen.

(Deposition of Peter Corvia.)

Q. Were they watery?

A. Watery and bloodshot.

Q. And was he using his handkerchief at that time?

A. I think the doctor gave him some stuff there on a cloth or rags or something.

Q. And did he have that? [185]

A. Yes.

Q. And was he putting it on his eyes?

A. Yes, he was taking care of himself.

Q. And was he complaining about it at that time——

A. He said it burned.

Q. (Continuing): ——the condition of his eyes?

A. He said his eyes were burning.

Q. Did he turn to at that time, or was he on the job—that is, when you saw him a couple of hours after this accident?

A. Oh, he was sitting down in the hatch.

Q. He wasn't working at that time?

A. Not at that time.

Q. Did he work that day after that?

A. I don't remember. I don't remember if any of us did.

Q. Did you ever notice any swelling of his eyelids? A. No, I never did.

Q. Did he talk to you about the condition of his eyes after the first day?

A. He didn't talk to me.

Q. He never complained to you about his eyes?

A. That day?

(Deposition of Peter Corvia.)

Q. No; after that day? A. Oh, yes.

Q. What would he complain about?

A. Well, they kept burning him.

Q. Did you notice his eyes being bloodshot continuously after that time? A. Oh, yes.

Q. And watering all of the time? [186]

A. I don't know about watering all of the time, but they were bloodshot most of the time.

Q. Did he say anything else about his eyes?

A. He said they hurt like hell all of the time.

Q. After this second fire did the condition of his eyes change?

A. They were still bloodshot as far as I know.

Q. They were just the same as before?

A. Yes.

Q. And when you left the vessel in October, or about then, did you notice the condition of Lubinski's eyes? A. They were the same way.

Q. Where was the vessel at that time?

A. Seattle.

Q. Did the crew pay off there?

A. That is right.

Q. And Lubinski, too? A. Yes.

Q. What side of the vessel were these mess boys on at the time you say they were playing this hose down on Lubinski?

A. They were on the starboard side at the end of No. 3 hatch.

Q. Could you see down into the hold when this smoke was coming out at the time of the second fire? A. You could see a little bit, yes.

(Deposition of Peter Corvia.)

Q. You could see a little bit? A. Yes.

Q. How far down could you see?

A. About fifteen or twenty feet.

Mr. Kay: I believe that is all. [187]

Redirect Examination

Q. (By Mr. Michelson): You say you could see down about fifteen or twenty feet into the hatch, is that correct?

A. Down to the lower hold.

Q. About fifteen or twenty feet down?

A. Yes.

Q. Where are you measuring from—up on deck?

A. Right from the hatch coaming.

Q. Where you were standing?

A. That is right.

Q. Now, you signed on the vessel in San Francisco? A. Yes.

Q. And you believe it was about the first of July? A. Yes.

Q. And then where did the vessel go from San Francisco first? A. Right straight to Attu.

Q. It went right to Attu? A. Yes.

Q. And the vessel remained there some days, did it? A. Several days.

Q. And it was during that time that the fire occurred in the forepeak? A. That is right.

Q. And there was only one fire in that forepeak at that time? A. Yes.

Q. And with reference to this fire in No. 3 hold, you were working down there with Lubinski and two other members of the crew, were you?

(Deposition of Peter Corvia.)

A. In No. 3 hold? [188]

Q. In No. 3 hold. That is where the fire took place, isn't it?

A. May I hear that question again?

Mr. Michelson: Will you read the question?

(Pending question read.)

Mr. Michelson: I am mistaken. You are correct.

Q. When you were working in No. 2 hold,—

A. Yes.

Q. (Continuing): —there were Lubinski and two other A.B.'s and some longshoremen?

A. That is right.

Q. And you were not watching the other men as to what they were doing, were you, all of the time?

A. No, I was doing my own work.

Q. How many ladders are there that go down into that No. 2 hold?

A. There is one that I know of, and possibly two; there should be.

Mr. Kay: What was that question and answer, Mr. Reporter?

(Record read.)

Q. (By Mr. Michelson): You have spoken of smoke being on yourself and being on Lubinski.

A. Yes.

Q. Now, do you mean smoke, or just what do you mean?

Mr. Kay: Well, now, Mr. Michelson, I object to that as leading and suggestive. He has testified on that.

(Deposition of Peter Corvia.)

Q. (By Mr. Michelson): Do you have trouble expressing yourself, Mr. Corvia?

A. What do you mean, do I have trouble? [189]

Q. Well, for instance, you know what smoke is, do you? A. Yes.

Q. Did you see smoke floating around you?

A. It came right up out of the storeroom.

Q. In the forepeak? A. In the forepeak.

Q. And then there was an orange substance on you? A. Yes.

Q. And you think it came from the smoke?

A. I know it did.

Q. And that was the same thing that happened to Lubinski?

A. Oh, there is no doubt about it.

Q. And did you get any of that smoke on your face? A. I got some on my face, yes.

Mr. Kay: Pardon me. What was that answer?

(Witness' answer read.)

A. Yes.

Mr. Michelson: And some on your clothing?

A. That is right.

Q. Now, after you looked down the forepeak, when the smoke was coming out of there, what did you then do?

A. I rushed to the side to get a little air, and started spitting.

Q. And did you stay there for some time?

A. Stay where?

Q. Did you stay at the rail?

A. Oh, yes, sure.

(Deposition of Peter Corvia.)

Mr. Kay: Well, "some time"—

Mr. Michelson: Wait a minute.

Mr. Kay: You said "some time." [190]

Mr. Michelson: Well, I asked him if he stayed there for some time.

Mr. Kay: Ask him how long he stayed there.

Mr. Kay: Yes, and you asked him whether he went to the rail and stayed there for some time.

Mr. Michelson: I know I did.

Q. Do you know whether or not Lubinski came up out of that hold while you were away—whether Lubinski came up out of the forepeak while you were away from the hatch leading into the forepeak?

A. When he came up, that was when I went over to get the dope, you know, and to see what was the matter.

Q. Did you stay at the entrance to the forepeak all of the time? A. Oh, no.

Q. Did you go away from there while Lubinski was down in the forepeak? A. Yes.

Q. About how long were you away from there?

A. That is pretty hard to say. Time goes by like that (witness snaps fingers), and it is pretty hard to guess or say.

Q. Was it a few minutes or some minutes?

A. A few minutes, yes.

Q. Do you know when you were away from there whether or not he did come up?

A. He couldn't have.

(Deposition of Peter Corvia.)

Q. What did Lubinski do, if anything, regarding getting this stuff off his face after he came up out of the hatch leading into the forepeak? [191]

A. He tried a couple of times to brush it off with his hand, you know, but that wasn't any good.

Mr. Michelson: That is all.

Recross Examination

Q. (Mr. Kay): Mr. Corvia, that forepeak hatch opening is about how far from the rail where you went to get some fresh air? A. Well——

Q. It is just a small distance, isn't it?

A. Yes. Where I went it was about three feet.

Q. About three feet? A. Yes.

Q. In other words, when you say you went to the rail, you didn't go far? You just took a step over to the rail? A. That is about all.

Q. And you stayed there this twenty minutes that you were around there and before you went to the doctor? I mean you stayed either at the rail or near that hatch opening there?

A. I was waiting for the boatswain to come up again.

Q. So that you actually saw during this twenty minute period that he was down there and didn't come up? I mean if he had come up you would have seen him?

A. Oh, yes, sure, I would have seen him; I seen everything.

Q. And he didn't come up during those twenty minutes? A. Yes, sure, he came up.

(Deposition of Peter Corvia.)

Q. Other than this one time when you helped him take his mask off he didn't come up other than that? A. No.

Mr. Kay: That is all. [192]

Redirect Examination

Q. (By Mr. Michelson): Then you went down to the doctor? A. I did, yes.

Mr. Michelson: That is all.

Mr. Kay: That is all.

(Deposition concluded.)

Mr. Levinson: That is the Libelant's case, your Honor.

The Court: Do you offer this deposition?

Mr. Levinson: I offer the testimony of Peter Corvia in evidence.

The Court: It is now admitted as part of the Libelant's case, and the Libelant rests. The respondents may proceed with their testimony.

Libelant rests.

Mr. Franklin: At this time, if your Honor please, we would like to read in evidence the deposition of Captain Charles N. Goodwin, taken on behalf of Respondents at Seattle, Washington, June 5, 1944.

The Court: You may do so.

CHARLES N. GOODWIN,

called as a witness on behalf of Respondents, having been duly sworn by the Notary Public, testified on behalf of Respondents by deposition as follows:

Direct Examination

Q. (By Mr. Franklin): Would you state your name, please? [193] A. Charles N. Goodwin.

Q. Where do you live, Captain?

A. Route 3, Box 2630, Renton, Washington.

Q. By whom are you employed at the present time, Captain?

A. Alaska Steamship Company.

Q. In what capacity?

A. Master of a vessel?

Q. Of what vessel?

A. The S.S. George Flavel.

Q. How long have you been master of that vessel? A. The 4th of April, 1943.

Q. You are in the process of leaving Seattle at this time to be gone indefinitely?

A. That is right.

Q. You do not know whether you will be back in Seattle at the time this matter may be set for trial?

A. I do not know.

Q. How long have you had a master's license?

A. December, 1939.

Q. How long have you followed the sea?

A. I started in 1923.

Q. Have you followed the sea continuously since then?

(Deposition of Charles N. Goodwin.)

A. Well, I was off a couple of years in between, working ashore.

Q. In general what has been the character of your service? Coastwise?

A. Mostly coastwise, the Alaska service. I have run some off shore, running to the Orient. I ran about three years to the Orient.

Q. When did you get your first mate's license?

A. It was approximately 1937.

Q. When did you get your third mate's license?

A. It was in 1929.

Q. Captain Goodwin, directing your attention to the *George Flavel*, its movements during the year 1943, I will ask you where the vessel was on approximately June 23, 1943?

A. San Francisco.

Q. What were you doing there?

A. Arriving there to load for the Army.

Q. What did you load in San Francisco?

A. Well, I would say about 75 percent of the cargo, between 75 and 80 percent, was ammunition. The rest was coal, kindling wood, and general impedimenta like rations.

Q. Any jeeps?

A. Well, very few at San Francisco at that time. There was some medical supplies.

Q. Did you as master of the vessel have anything to do with the loading of those supplies?

A. No, sir.

Q. Who loaded them?

A. That was loaded by the Army.

Deposition of Charles N. Goodwin.)

Q. Did you as master have anything to do with designating the cargo you took?

A. Not a thing.

Q. Who designated that?

A. As far as I know the Army did.

Q. Did your cargo include any landing barges?

A. Yes, sir.

Q. Where were they stowed?

A. On deck. [195]

Q. Captain Goodwin, did you carry any troops on board? A. I did.

Q. A substantial number? A. Yes, sir.

Q. Did you know at the time where you were destined? A. Not definitely.

Q. Later you ascertained that you were to be part of the Kiska invasion?

A. Well, yes. I didn't know at that time where I was going.

Q. Were gas masks issued to the members of the crew? A. Yes, sir.

Q. By whom?

A. As far as I know, the Army, in San Francisco.

Q. Captain Goodwin, where did you first stop after leaving San Francisco? A. Adak.

Q. Between San Francisco and Adak did you authorize the placing of any of the landing gear in any particular part of the vessel?

A. Yes, sir.

Q. Would you state how that came about?

A. Well, they had a lot of extra equipment put

(Deposition of Charles N. Goodwin.)

aboard, so I took those boats, which is a very valuable item when you need it—at that time they were on deck, the extra equipment, and every man had access to it, and the amphibious force commander, an Ensign, asked the mate if there was a place he could stow it. The mate came and asked me and I said I didn't know why we couldn't put it in the forepeak, it looked as good [196] as any place to me. I didn't figure on doing anything that was dangerous.

Q. Why did you think the forepeak would be the safest part of the ship to stow any of this invasion cargo?

A. The only ones that had access to it was our crew, and if we stowed it down in the holds they might be down there looking for something else, the Army, when they were looking for different items. And it was handy to get at in case you needed it in a hurry, and you want it in a place so if you need something you can get it in a hurry.

Q. After you gave the permission to stow the invasion equipment in the forepeak did you know of your own knowledge who had access to that forepeak?

A. The Ensign in charge of the amphibious force could go down there, and our deck crew had access to it. We had the keys to it.

Q. Then it would be the amphibious force and your deck crew that would have access to it?

A. That is right.

(Deposition of Charles N. Goodwin.)

Q. How many men were members of the amphibious force?

Mr. Levinson: He didn't say that. He said just the Ensign of the amphibious force had access to it.

The Witness: Yes.

Q. And the Ensign could permit the members of the amphibious force to work there if necessary?

A. That is right.

Q. How many members of the amphibious force were on the vessel at the time, approximately?

A. 27, I believe. [197]

Q. You yourself never visited the forepeak after this cargo was stowed there?

A. No, I did not.

Q. Were you present at the time the smoke bomb plug became loosened, at Kiska?

A. No, sir.

Q. Where were you?

A. I was on the Greenup, visiting the master of the Greenup.

Q. When you returned to the vessel had the distress signal been removed? A. Yes, sir.

Q. You visited the forepeak at that time?

A. Yes, sir.

Q. Captain Goodwin, do you remember the morning of the Kiska invasion?

A. Yes, sir; very well I do.

Q. That was when?

A. That was the 15th day of August, 1943.

(Deposition of Charles N. Goodwin.)

Q. Where was the Flavel lying at that time with reference to the beachhead?

A. It was anchored off about three-quarters of a mile the west side of Kiska Island, a place called Quizling Cove.

Q. Before reaching Kiska had you made any stop?

A. From the time we left to go on this invasion?

Q. Yes.

A. No. We left Adak and went right out.

Q. Did you stop at Adak?

A. That was our leaving point for Kiska. That is where the assembly was. [198]

Q. Did you discharge any men at Adak?

A. From Attu?

Q. Yes.

A. I made several trips in between. I went to Nome, St. Paul Island and Adak. We had practice Maneuvers. We were taking them on and discharging them all the time, practicing.

Q. Were you also taking on and discharging cargo after reaching Alaska? A. Yes.

Q. Who was in charge at that time of designating what cargo would be loaded and where it would be stowed? A. The Army.

Q. Was it your duty as Master solely to navigate the vessel on this voyage according to directions issued you by the Navy?

Mr. Levinson: I object to the question as leading.

Deposition of Charles N. Goodwin.)

Q. What were your duties with reference to the George Flavel on this voyage?

A. My duties were to see that she got from one port to another. I am in charge of the navigation of the ship and the safety of the ship.

Q. On this particular voyage did you have anything to do with the loading, unloading or stowing of any of the cargo aboard the vessel?

A. No, sir.

Q. Captain Goodwin, after reaching Kiska when did the troops begin to leave your vessel?

A. Approximately 5:00 a.m. in the morning. That is, for the first wave. We started immediately on anchoring, [199] which must have been around 2:30 or 3:00 in the morning. That is, we put the landing barges in the water, except two. We kept two at our ship, and sent them to the master ship where the invasion started. Our two were loaded. We put about fifty men in each one of them and on the track. That was our initial quota on the first wave.

Q. You had been up all night the night before?

A. Yes, sir.

Q. Did you go to bed?

A. I waited until they made the landing at 6:00 'clock, and I stayed up until approximately 8:15, and we didn't hear any firing from the beach, and they were making a landing, and we figured there was nothing serious, so I said I thought I would take a nap, and went to bed.

Q. What awakened you?

(Deposition of Charles N. Goodwin.)

A. The second mate came running aft, hollering, and told me there was a fire in No. 2 hold.

Q. What did you do?

A. I jumped up and immediately went up on the bridge. By the time I got there the alarm had been sounded. I sounded it again, the general alarm. We had hoses running to the hatch, and the water was started. I also signalled to the commodore to get as many landing barges alongside as possible, and to try to get a destroyer alongside so I could get the men out.

Q. What were you apprehensive about?

A. I was apprehensive because at the time I didn't know exactly what type of cargo I had in the hold, whether it was loaded completely with ammunition or not. I knew there was some down there, and I had the men immediately [200] find out how much ammunition was down there, and what the contents of that particular hold were.

Q. Did you at any time order the boatswain, Mr. Lubinski, to go down and fight the fire in the hold?

A. No, sir, I didn't order any man specifically. I gave my orders to the chief officer and told him to get somebody down there, but there was no man designated.

Q. Do you know what caused that fire in No. 3 hatch? A. Yes.

Q. State what it was.

Mr. Levinson: You know only what somebody told you.

(Deposition of Charles N. Goodwin.)

Q. Did you make an investigation?

A. I was down in the hold myself before the fire was completely out.

Q. What caused the fire?

Mr. Levinson: Do you know what caused it?

The Witness: Yes.

Mr. Levinson: Did you see it or did somebody tell you. You know we have a hearsay rule that you cannot testify to what somebody told you.

Q. My question is, Captain; you were down in the hold yourself?

A. I was down there myself.

Q. Did you see Mr. Lubinski down there?

A. I did not.

Q. Captain Goodwin, did you make an investigation, as master of the vessel, to determine what caused the fire? A. I did.

Q. What did that investigation reveal?

Mr. Levinson: I make the same objection. It was [201] not an official investigation.

The Court: The objection is overruled.

A. It was caused by a soldier starting a jeep, and it backfired and caught on fire.

Mr. Levinson: I move to strike the answer.

The Court: The motion is denied.

Q. How long did it take to put the fire out?

A. Roughly, I would say 45 minutes.

Q. Did you subsequently locate where the fire was burning?

A. Yes, sir. I was down there before the fire was completely out in the jeep, myself.

(Deposition of Charles N. Goodwin.)

Q. Describe the condition of the jeep, that you observed.

Q. When I got there it was practically burned up, and what had caused the smoke, the real smoke, was a couple of sleeping bags that had been put in it, and a couple of knapsacks, and they were burned completely up. It was still burning when I was down in the hold. The wiring on it was still burning when I got there. The third mate was the man that put the fire out in the jeep, himself. I was standing right there when he had the hose and finished it.

Q. What part of No. 3 hold was it?

A. It was on the port side, in the after part of the hatch, back underneath the bulkhead.

Q. Down in the lower hold? A. Yes, sir.

Q. State whether or not that hold was being discharged at the time the fire began?

A. Well, it had been being discharged, and I cannot say exactly at the time whether they were working in that [202] hold. You see, the way these things work, they have different items in different holds, and they may come out and say "We want this", and that may be in No. 2, and they will get it out of No. 2.

Q. Who would give those orders?

A. The Army. Someone on the beach would say what they wanted and they would notify our ship. They would send out a boat and notify us that maybe they want a jeep out of No. 3 hold, or maybe they would want a load of ammunition out of No. 2 hold, a type of ammunition. It might be in No.

(Deposition of Charles N. Goodwin.)

2 or No. 5. They designate that and you shift back and forth with the operation, just whatever they want or need at that moment.

Mr. Franklin: That is all. Thank you.

Cross Examination

By Mr. Levinson:

Q. You are with the Alaska Steamship Company now? A. Yes.

Q. Have you worked for them before?

A. Yes, sir.

Q. On what ships?

A. On the Yukon, the Alaska, the Depere, the Bering, the Cordova, and the Baranof.

Q. Your service has been substantially with the Alaska Steamship Company since you have been in active service? A. The majority of it, yes.

Q. And that was true prior to the war?

A. Yes.

Q. In other words, the fact that this is a Liberty ship, [203] operated by the Alaska Steamship Company, you still consider yourself an employe of the Alaska Steamship Company?

A. That is right.

Q. You loaded your cargo for the initial voyage at San Francisco on June 23, 1943?

A. That was part of the initial loading.

Q. Well, the Army indicates the cargo to be placed aboard? A. That is right.

Q. What do the mates do in connection with that process?

(Deposition of Charles N. Goodwin.)

A. The mates have very little to say about it. At that particular time we were in the process of what they call invasion loading, and they put their own men aboard to load. They had two men travel with us the whole time. They were called T. Q. M., a kind of a quartermasters corps, and these two officers—there were two lieutenants in charge. They designated it. They all worked with the mate, but they had practically all to say where the cargo was going, because they knew just exactly how they wanted it in there.

Q. But the mate participated in that with relation to his usual duties as mate, as to when the cargo should come out and how it should be stowed with reference to the safety of the ship, and things of that nature. In other words, these men were along to indicate the priority of the cargo, and how they wanted it, and its availability, and your own mate was along to see that it was stowed in accordance with the usual ship's procedure and practice, for safety of the ship and the crew?

A. Oh, yes. [204]

Q. That is the usual method, isn't it?

A. That is all taken care of through the stevedores ashore, to handle the loading.

Q. With reference to the gas masks; they are supplied by the Army?

A. As far as I know, they were supplied by the Army.

Q. And it is part of the regular ship's equip-

(Deposition of Charles N. Goodwin.)

ment, isn't it? Don't you carry gas masks as part of the ship's equipment?

A. Yes. The law requires you to carry so many. But that is a special mask.

Q. It is a substitute for the type of gas mask required by law?

A. As far as I know, any ship that is connected with any invasion or anything like that, it is issued to us by the Army.

Q. Did you have any other gas masks on the ship at that time?

A. We had the regular, what the Steamboat Inspection Service calls for.

Q. You had those aboard the ship?

A. Yes.

Q. Do they differ any from those issued by the Army?

A. Yes. These are a different type. They are bigger masks.

Q. Those Army masks?

A. No; those required by the law.

Q. Have you any knowledge as to their comparative efficiency?

A. No, I have not: I never tried to use them. I have tried out the ones we have on the ship.

Q. These additional supplies which you had on deck, you say the mate came to you with a request that he wanted those placed some place where where it would be safe? A. That is right.

Q. You indicated the forepeak because of the

(Deposition of Charles N. Goodwin.)

fact of its location, and it was available to the members of the crew? A. That is right.

Q. The members of the crew working on the ship, the deck crew, have access to the forepeak and use it quite a good deal to get their gear out, don't they? A. That is right.

Q. And a great part of their gear is in the forepeak? A. That is right.

Q. And they are expected to go in and out and get the gear that may be necessary?

A. Yes, sir.

Q. Who is the person in charge of the stowage of the material in the forepeak in that event; which mate? A. The first mate.

Q. It is his job to see that whatever is in the forepeak is made accessible to the men, and also that it is stowed in such a way that the men are protected from a safety standpoint?

A. That is right.

Q. Do you happen to know the nature of the equipment that was placed in the forepeak?

A. Oh, it was some wrenches, some spark plugs, wheels—different little items.

Q. That is the usual gear in the forepeak, isn't it? A. No.

Q. In addition to the regular loading gear?

A. You mean this extra amphibious gear?

Q. Yes.

A. That is what it was. It was wrenches for working on their engines and propellers.

(Deposition of Charles N. Goodwin.)

Q. How about the smoke bombs?

A. I didn't even know the smoke bombs were aboard the ship. I didn't know they were aboard the ship at the time.

Q. The forepeak of a new ship like the Flavel, and with new equipment, is usually pretty full?

A. No. Ours was not so full. We had lots of space up there.

Q. It was a large forepeak?

A. A large forepeak.

Q. Those things are always stowed, of course, so it is accessible to the men who want to go in and get it?

A. That is right. We have other lockers on there, too, besides the forepeak, where we can store gear.

Q. Anyway, it is the first mate who is responsible for the condition of the stowage in the forepeak?

A. That is right. He orders the boatswain or whoever is around running the gang. The mate tells him to put it away, and put it in ship-shape. He expects them to do it.

Q. And then he inspects it? A. Yes.

Q. It is customary, is it not, when they need any gear, for the boatswain or whoever calls for the gear to send a man into the forepeak to obtain it?

A. That is right.

Q. That is the usual procedure? A. Yes.

Q. In your reloading, we may say, at Attu—you took on [207] some more cargo at Attu?

(Deposition of Charles N. Goodwin.)

A. We discharged some and took on some.

Q. What part does the mate play in that?

Mr. Franklin: Did he play any part in that?

Q. Or did he play any part in that?

A. He conferred with the Army officials as to what there was to load, and where they wanted it discharged. You might as well say they worked as a team, together.

Q. They stowed it according to his judgment?

A. Yes.

Q. But at any landing the same thing is true, you are responsible for the safety of the ship and the safety of the crew? A. Yes.

Q. When you say you are in complete charge of the ship to navigate it where you may be directed, you are in complete charge of the vessel as far as the navigation and operation of the vessel is concerned?

Mr. Franklin: The operation of the vessel?

Mr. Levinson: That is right.

Mr. Franklin: Not in an invasion.

Mr. Levinson: I mean he follows orders as to where it shall go.

Mr. Franklin: Yes.

Q. That is right, isn't it?

A. We are getting ahead of the story. We were out at Attu; we were not on an invasion at that time. At that time, yes, I was in complete charge of the vessel. As far as I was given my orders where they wanted me to go, I took the ship there, where they told me, to. [208]

(Deposition of Charles N. Goodwin.)

Q. Up to that point, where you took the ship where they told you to take it, you were primarily responsible for the ship and the crew?

A. That is right.

Q. Which includes the stowage of the ship's gear and whatever may be on the ship, with reference to the crew's safety?

A. Well, I am responsible, yes. I will grant anybody that. But it is up to the officers, my officers, to see that that is done.

Q. This fire that occurred at Kiska, a destroyer did come alongside, didn't it?

A. That is right.

Q. And I believe you had a hose over from the destroyer?

A. We did.

Q. Who were handling the various hoses; do you recall?

A. Now, that is a pretty hard question, because there was so much excitement going on there, and there was so much involved that a man just cannot sit right down and remember exactly who had the hoses. I do distinctly remember there was a couple of colored boys. I remember them having one of the hoses. I know the third mate did, either the third mate or the second mate. I believe the third mate had one for a while, and he went down in the hold.

Q. The hose that was being handled by the colored boys, was that the ship's hose?

A. That was the ship's hose.

(Deposition of Charles N. Goodwin.)

Q. You did not watch them, you do not know how they were swinging it around? [209]

A. Oh, yes, I saw them. There wasn't very much swinging around. The hoses were down, and if they had them too far down we pulled them up to the top.

Q. You, of course, did not order any of the men below? A. I didn't designate any man.

Q. It is the mate's job to do that?

A. I told the chief officer to get somebody, and did not designate a man; to get somebody to get them down there.

Q. Do you know whether or not Lubinski went down, that is, the boatswain?

A. I don't know. Personally, I don't think he did.

Q. Of course, you don't know?

A. I am almost positive.

Q. That is because of your knowledge of Lubinski, is that it?

A. No. Just the idea I have in mind of the men who went down there, and I don't ever remember seeing him down there. I know the men that went down there.

Q. Some of the men? A. Yes.

Q. You do not know all of the men, of course?

A. I know the men that went down there, and I don't remember seeing him down there.

Q. At least if he and the mate say that he went down there you do not have any sufficient knowledge to say that is not correct?

(Deposition of Charles N. Goodwin.)

Mr. Franklin: That is objected to as argumentative.

Mr. Levinson: Let us find out.

The Court: It is cross examination, and that is proper, in my opinion. [210]

A. I will stick to my story that he didn't go down there.

Q. You didn't see him down there?

A. No.

Q. There was a lot of smoke around?

A. There was a lot of smoke around, yes.

Q. How many men of the ship's crew were down there?

A. I only saw one man that went down to the bottom of the hold when the smoke was bad.

Q. Who was that?

A. A sailor they called "Whitey." I don't know his name.

Q. When you went down there had someone been down there, when you and the third mate went down there?

A. This "Whitey" had been down there. He and the third mate were down there when I got down there, and after the fire was out who came down there to see it I don't remember now, because as long as the fire was out and I knew the ship was safe then I had too many other things to do.

Q. Where was the boatswain at the time of the fire?

A. He was around the hatch, as far as I know. I think he helped swing in some lifeboats. I had

(Deposition of Charles N. Goodwin.)

all the boats over the side and I had to swing them in to get the destroyer alongside. The boatswain was around the hatch, I know that.

Q. He was active in carrying out whatever duties may have been given to him?

A. Yes, that is true.

Mr. Levinson: I think that is all. [211]

Redirect Examination

By Mr. Franklin:

Q. One more question. Were any of the members of the amphibious force fighting the fire with hoses?

A. No. The amphibious force was ashore with their boats at the time.

Q. The Navy was helping?

A. The armed guard personnel was helping. In fact, every man on the ship was involved; they were there doing something.

Q. Did you see any of the U. S. Navy armed guard handling the hoses?

A. They helped drag some hose aft up to the hold, I know, because I sent for them to bring the hose aft so we could run a line from one of the other hydrants. I sent them back to bring the hose up forward so we could hook up another hydrant and get as much water in there as possible.

Q. Do you know whether they were manipulating any of the hose?

A. I couldn't say. I really don't know.

Q. How long were you down in the hold at the Kiska fire?

(Deposition of Charles N. Goodwin.)

A. I was down there about ten minutes, I should say. When I got down there it was practically out. It was just the last of it. The third mate was there.

Q. Did your voyage terminate about September 28, 1943? A. That is right.

Q. At any time on that voyage did the boatswain, Mr. Lubinski, make any complaint to you, personally, that his eyes had been affected either by the fumes from the distress signals [212] at Attu, or from the smoke of the Kiska fire?

A. He never made any complaint about it, that the smoke caused his eye trouble. He had trouble with his eyes and I sent him to the doctor at Adak. He never said what it was caused from.

Mr. Franklin: That is all.

Mr. Levinson: That is all.

Q. (By Mr. Franklin): Captain Goodwin, do you waive the reading and signing of your deposition.

A. Yes.

Mr. Franklin: And do you waive it, Mr. Levinson?

Mr. Levinson: Yes.

(Deposition concluded.)

Mr. Franklin: We offer this deposition of Captain Chas. N. Goodwin in evidence, your Honor.

The Court: It will be received in evidence as part of the Respondents' case.

Mr. Franklin: We will next call Mr. V. W. Killingsworth.

V. W. KILLINGSWORTH,

called as a witness on behalf of Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, please?

A. V. W. Killingsworth.

Q. Where do you live?

A. In Seattle, Washington.

Q. By whom are you employed at the present time? [213]

A. By the Alaska Steamship Company.

Q. In what capacity?

A. Executive assistant.

Q. To whom?

A. To the vice-president and general manager, Mr. Baker:

Q. How long have you been in the employ of the Alaska Steamship Company?

A. Since March, 1936.

Q. Is the Alaska Steamship Company still operating any vessels, or a fleet of vessels?

A. No, sir; not as a steamship operator.

Q. When did it cease?

A. During May and June, in 1942.

Q. What happened to its then fleet of vessels?

A. They were requisitioned by the United States War Shipping Administration.

Q. What has been the character of the work of the Alaska Steamship Company since the requisitioning?

(Testimony of V. W. Killingsworth.)

tioning of its fleet by the United States Government?

A. Since that time they have acted solely as general agent for the War Shipping Administration, under a service agreement.

Q. State whether or not a written general agency agreement was entered into between the Alaska Steamship Company and the War Shipping Administration of the United States?

A. Such an agreement was entered into.

Q. Have you the original in your possession?

A. Yes, sir.

Q. Do you know the date of the execution of that agreement?

A. It is dated March 9, 1942. [214]

Mr. Franklin: If the Court please, Mr. Killingsworth has in his possession the original general agency agreement which the Alaska Steamship Company is required at all times to have available in its dealings with the United States Government, and it has been stipulated by proctor for the Libelant that a copy of that agreement may be offered in evidence in lieu of the original, and we therefore at this time ask that this copy of the general agency agreement of March 9, 1942, be marked for identification.

(Copy of General Agency Agreement dated March 9, 1942, marked for identification as Respondents' Exhibit A-3.)

The Court: Mr. Killingsworth, do you know whether or not this is one of the carbon copies origi-

(Testimony of V. W. Killingsworth.)

nally made at the time the original was drawn up and entered into?

The Witness: No, sir; it is not.

The Court: It is a copy made later, at leisure?

The Witness: Yes, sir.

Q. (Mr. Franklin): Have you compared that Respondents' Exhibit A-3 for identification with the original to ascertain that it is a true and correct copy of the original?

A. Yes, sir.

Q. What did that comparison show?

A. I know it is a copy of the general agency agreement, Form G.A. 4-442, as it is commonly known in the trade.

Q. What number, if you recall, does the original general agency agreement bear?

A. It is contract No. W.S.A. 355. [215]

Q. Is that a number assigned exclusively to the Alaska Steamship Company?

A. That is correct.

Q. Has any other subsequent general agency agreement been entered into, other than the one you have referred to as of March 9, 1942?

A. No. That is the general agency agreement.

Mr. Franklin: At this time, if the Court please, we offer what has been marked Respondents' Exhibit A-3 in evidence.

Mr. Levinson: I have no objection to the fact that it is a copy, your Honor. I have no objection to the exhibit whatever, although I expect to challenge its application.

(Testimony of V. W. Killingsworth.)

The Court: It is admitted in evidence.

(Copy of General Agency Agreement dated March 9, 1942, received in evidence as Respondents' Exhibit A-3.)

Q. (By Mr. Franklin): Mr. Killingsworth, would you advise the Court how vessels were allocated to the Alaska Steamship Company following the execution of that agreement?

A. As a vessel is nearing completion in the shipyard the allocation committee of the War Shipping Administration determined to which general agency the vessel would be assigned, and upon that determination a letter was written to the General Agent advising the General Agent of the assignment of the ship, and under what conditions.

Q. Directing your attention specifically to the Steamship "George Flavel," did you receive any letter of allocation of that vessel to the Alaska Steamship Company, as General [216] Agent, from the War Shipping Administration? A. Yes.

Q. Have you an allocation letter in your possession sent by the War Shipping Administration?

A. Yes, sir.

Q. What is the date of that letter?

A. The date is March 8, 1943.

Mr. Franklin: And here, again, if the Court please, it has been stipulated that a copy may be substituted. I will ask to have that copy marked for identification.

(Copy of letter dated March 8, 1943, U. S.

(Testimony of V. W. Killingsworth.)

War Shipping Administration to Alaska Steamship Company, marked for identification as Respondents' Exhibit A-4.)

Q. (By Mr. Franklin): Hand you what has been marked for identification as Respondents' Exhibit A-4, I will ask you if you know what that is?

A. This is a copy of the letter from the Managing Charters and Agency Section, Division of Operations, of the War Shipping Administration, in Washington.

Q. Under what date?

A. Dated March 8, 1943.

Q. With reference to what vessel?

A. The SS "George Flavel."

Q. Have you examined and compared Respondents' Exhibit A-4 for identification with the original to ascertain whether it is a true and correct copy of the original? A. I have.

Q. What did you find?

A. I found that it is a true and correct copy.

Q. Is it necessary in the operation of the Alaska Steamship [217] Company as general agent that the allocation letter be retained and be at all times available? A. That is right.

Mr. Franklin: With the consent of counsel, your Honor, we will ask that Respondents' Exhibit for identification A-4 be received in evidence as Respondents' Exhibit A-4.

Mr. Levinson: I have no objection.

The Court: It may be admitted.

(Testimony of V. W. Killingsworth.)

(Copy of letter dated March 8, 1943, U. S. War Shipping Administration to Alaska Steamship Company admitted in evidence as Respondents' Exhibit A-4.)

RESPONDENTS' EXHIBIT No. A-4

(Copy)

War Shipping Administration
Washington

March 8, 1943

Alaska Steamship Company
Pier 1
Seattle, Washington

Gentlemen:

SS George Flavel Mee No. 1617

The above vessel has been allocated to your company under service agreement, form GAA (Contract WSA 355) dated March 9, 1942 for service as directed by the War Shipping Administration.

This vessel is expected to be ready for delivery by Oregon Shipbuilding Corporation at Portland, Oregon on April 12, 1943. It is requested that you contact our Pacific Coast Director, Mr. A. R. Lintner at San Francisco and arrange to take delivery under service agreement when the vessel is ready.

Marine P and I insurance satisfactory to our Division of Insurance should be placed by your company with commercial underwriters, effective as of the time that the first member of the vessel personnel is placed aboard. Please forward insur-

(Testimony of V. W. Killingsworth.)

ance policy for approval to our Division of Insurance.

You will be advised in due course regarding the placing of certain personnel aboard the vessel prior to delivery.

Very truly yours,

G. A. DUNDON,

Manager, Charters and Agencies Section Division
of Operations

(Respondents' Exhibit A-4 read.)

Q. (By Mr. Franklin): Mr. Killingsworth, was there any subsequent allocation letter issued referable to the SS "George Flavel," following the letter that was just read?

A. Yes; there was.

Q. Under what date?

A. Under date of April 8, 1943.

Q. Have you the original letter in your possession? A. I have.

Mr. Franklin: I will ask that it be marked for identification.

(Letter dated April 8, 1943, Chief of Allocation Assignments at San Francisco to Alaska Steamship Company marked for identification Respondents' Exhibit A-5.)

The Court: By what term do you refer to this later communication? [218]

Mr. Franklin: The allocation letter.

(Testimony of V. W. Killingsworth.)

The Court: A supplemental one?

Mr. Franklin: A subsequent one, yes.

Q. (Mr. Franklin): I hand you an exhibit which has been marked for identification as Respondents' Exhibit A-5, and ask you if you know what that is?

A. That is a true and correct copy of the letter of April 8, 1943, from the Chief of Allocation Assignments at San Francisco, concerning the employment of the vessel.

Q. What vessel?

A. The SS "George Flavel."

Q. Have you compared that exhibit with the original letter? A. I have.

Q. With what result?

A. That I find it is a true and correct copy of the original letter.

Q. Is it necessary that the Alaska Steamship Company retain the original supplemental letter of allocation of this vessel? A. It is.

Mr. Franklin: At this time, if the Court please, we offer what has been marked Respondents' Exhibit A-5 for identification in evidence.

Mr. Levinson: No objection.

The Court: It may be admitted in evidence.

(Letter dated April 8, 1943, Chief of Allocation Assignments at San Francisco to Alaska Steamship Company admitted in evidence as Respondents' Exhibit A-5.)

(Testimony of V. W. Killingsworth.)

RESPONDENTS' EXHIBIT A-5

(Copy)

War Shipping Administration
200 Bush Street
San Francisco, California

April 8, 1943

Alaska Steamship Co.

Pier 2

Seattle, Washington

Gentlemen:

Subject: SS. George Flavel

The above vessel, allocated to you for operation under Service Agreement Form GAA, is expected ready for delivery at Portland immediately.

This vessel has been assigned to operation in the Alaska pool under direction of Mr. W. E. Brown, Assistant Pacific Coast Director, War Shipping Administration, Seattle, Washington, and it is requested that you contact Mr. Brown for further instructions.

Yours very truly,

/s/ H. N. MIDDLETON

Chief, Allocations and Assignments

cc—Mr. Keating, WSA, Washington, D. C.

Mr. Darr, WSA, Washington, D. C.

Mr. Brown, WSA, Seattle, Washington

Mr. Powell, WSA, Portland, Oregon

Mr. Pattern, WSA, San Francisco

Grace Line, Portland, Oregon

(Testimony of V. W. Killingsworth.)

Q. Will you kindly read Respondents' Exhibit A-5? A. Yes, sir. [219]

(Witness reads Respondents' Exhibit A-5.)

Q. Mr. Killingsworth, did the SS "George Flavel" come under the service agreement or agency agreement with the Alaska Steamship Company by virtue of this letter you have just read?

A. Yes, sir.

Q. Was it under that status as of June 23, 1943, and subsequent thereto, on the trip to Kiska, Attu, Honolulu and return to Seattle?

A. Yes, sir.

The Court: I wish you would simplify that question.

Q. Has it remained at all times continuously under that status since allocation to the Alaska Steamship Company by the War Shipping Administration?

A. There has been no change in the nature of the allocation.

Q. It is so at the present time?

A. It is so at the present time.

Mr. Franklin: That is all.

The Court: What do you mean by all of that?—what status?

The Witness: As applied to the ship from the beginning of its allocation to the company, and still so applies.

Mr. Franklin: If the Court please, the General Agency Agreement contemplates that from time

(Testimony of V. W. Killingsworth.)

to time vessels will be constructed and then assigned to the General Agent to operate under the General Agency Agreement, and the purpose of the last interrogatory was to establish that pursuant to these letters of allocation this vessel actually was operated upon date of [220] delivery by the Alaska Steamship Company, as General Agent, at all times to and including the present time.

The Court: You may cross examine.

Cross Examination

By Mr. Levinson:

Q. Mr. Killingsworth, as far as the general operation of the vessel is concerned, compared with the Baranof, the Depere, and all of the vessels that you owned at the time of the commencement of the war, as far as a practical matter is concerned you still operate those as your own ships, don't you?

A. They are operated in exactly the same manner as vessels of the same type and owned by the Administration, like the "George Flavel".

Q. It is only a question of accounting, isn't it?

A. No; they could not be compared that way.

Q. Is there any practical difference in the way the men sign on? They still sign on before the Shipping Commisisoner, and the only difference is that your cargo is designated, and you are not on a regular route, you go where you are told to go?

(Testimony of V. W. Killingsworth.)

Mr. Long: There are four questions there, as I counted them.

The Court: Yes; that objection is sustained. Simplify the question.

Q. You still employ the members of the crew in the same manner, do you not, as you did prior to the execution of the agreement?

Mr. Franklin: That is objected to upon the ground [221] that the General Agency Agreement is the best evidence.

The Court: The objection is overruled.

A. That situation is covered in the General Agency Agreement. They are hired for the account of the War Shipping Administration.

Q. That is what the General Agency Agreement may say, but I am asking you about the men signing on the ship. You know when they sign on you do not hand them a copy of the General Agency Agreement? A. That is right.

Q. There is no copy of the General Agency Agreement in the Shipping Commissioner's office?

A. There has been no change I know of, other than the fact there is some difference in the wording of the Articles. I am not entirely familiar with it, but it is covered in that way.

Q. You do not tell the men when they go to work on your ship that you work under a general agency agreement, do you?

A. No, although it is general knowledge that they are working——

(Testimony of V. W. Killingsworth.)

Q. Just answer the question.

The Court: Objection overruled to that answer.

The Witness: Do you wish me to proceed?

Mr. Franklin: Yes.

The Witness: It is common knowledge that on vessels operating under General Agency Agreement, or bare boat, as they are called, the employees aboard such vessels are employed by the United States.

Q. Did you, or any member of your organization, to your knowledge, ever advise these men at the time that they [222] signed on that they were operating under a General Agency Agreement?

A. Not to my knowledge.

Q. Do you know of any regulation in your firm which requires the Shipping Commissioner to be advised of the fact that these men are operating under a General Agency Agreement at the time that they sign on? Is there such a regulation?

A. There would be no regulation in our firm that would have any effect upon the Shipping Commissioner.

Q. At least you do not advise the Shipping Commissioner of that fact, do you, to tell these men they are working under a General Agency Agreement?

A. I am not in a position to say that. I am not familiar with the details of the operation.

Q. With reference to the operation of the vessel on various voyages, it is no different than any other line or custom of the Alaska Steamship Company?

(Testimony of V. W. Killingsworth.)

That is, they have cargo, and they are told where they want it to be picked up and delivered?

Mr. Long: The question is unintelligible, your Honor.

The Court: On account of the increasing cold affliction of several connected with the trial, you can stand if you wish to do so. Each side may have that privilege.

Q. The operation of the vessel is practically no different under present conditions, except you only have one customer, and that is Uncle Sam?

A. May I elaborate on that?

Mr. Long: Just a minute. There are two questions [223] there. Counsel says the operation is no different and they have only one customer. I think he should ask a specific question.

The Court: The objection is sustained.

Q. The operation of the vessel is no different now than it was prior to the war, except that you are now operating primarily for one customer?

A. I can hardly answer just "yes" or "no" to that question.

Q. You perform the duties of a ship's agent, and treat the ship in every respect as your own vessel, except that you must account differently under this General Agency Agreement, is that right?

A. Not entirely, no.

Q. Tell us in what way it differs.

A. In this respect, that before the War Shipping Administration took over the vessels, or req-

(Testimony of V. W. Killingsworth.)

quisitioned the vessels, we operated the vessels as we saw fit, depending on the cargo and passengers offered for the vessels. Since the requisitioning of the vessels the facilities of each vessel have from voyage to voyage been allocated by the War Shipping Administration, or the use of the vessel by the company has been performed with the consent or approval of the War Shipping Administration. That makes quite a difference.

Q. All right. Then the only difference is that the person who has the use of the vessel, in this instance has the entire use of the vessel, and because of that entire use he designates what voyages should be made and when the voyages should be made, is that right? A. That is right. [224]

Q. Then other than that there is substantially no difference from the prior operation. You do not have to go to the War Shipping Administration every time you want to do anything, do you?

A. Well, I have. Here at Seattle that is just about necessary, from what I have heard at Seattle.

Q. That is all you know about it is what you have heard?

A. It is necessary to consult the War Shipping Administration. Not every turn of the wheel to them, but a great many.

Q. What things do you consult the War Shipping Administration about?

A. About the use to which the vessel is to be put, about the maintenance and repair of the vessel, and we have to submit for approval to the

(Testimony of V. W. Killingsworth.)

War Shipping Administration the personal record forms of all of the licensed officers of the ship.

Q. That is after they are employed?

A. Yes. They are employed subject to approval by the Government.

Q. You placed P. I. insurance on this vessel with your usual underwriters, by virtue of this letter?

A. That is right.

Q. You have the same protection under that insurance as you normally had?

A. The policies extended to apply to the War Shipping Administration.

Q. That is the only difference, you have an additional assured?

A. Marine insurance is a field of its own, and I hesitate to answer any questions in that respect.

Q. Exhibit A-3 indicates you must place that?

A. Yes.

Q. You must carry insurance for the War Shipping Administration as an additional insured?

A. I understand that.

Q. And that is placed with a commercial company, the P. & I., such as this is?

A. Protection and indemnity insurance.

Q. The P. I. insurance that you place is placed with commercial underwriters, as advised in that letter?

A. That is right.

Q. And the premium or the fee for this P. I. insurance is charged as a legitimate charge on your account to the War Shipping Administration, as agent, isn't it?

A. That is right.

(Testimony of V. W. Killingsworth.)

Q. And the only difference is that the form of policy is required to meet the approval of the War Shipping Administration?

A. I am not familiar with the form of policy.

Q. And the P. I. insurance covers this particular matter we are in right now?

A. That is right.

Mr. Levinson: That is all.

Mr. Franklin: That is all.

(Witness excused)

Mr. Long: The next deposition we have, your Honor, is that of John Kristiensen, taken on June 22, 1944. [226]

No. 11097

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

WALTER LUBINSKI,
Appellee.

WALTER LUBINSKI,
Appellant,
vs.

ALASKA STEAMSHIP CO., a Corporation,
Appellee.

Apostles on Appeal

In Two Volumes

VOLUME II

Pages 271 to 531

Upon Appeals from the District Court of the United States
for the Western District of Washington
Northern Division

FILED

OCT 16 1945

No. 11097

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

WALTER LUBINSKI,
Appellee.

WALTER LUBINSKI,
Appellant,
vs.

ALASKA STEAMSHIP CO., a Corporation,
Appellee.

Apostles on Appeal
In Two Volumes
VOLUME II
Pages 271 to 531

Upon Appeals from the District Court of the United States
for the Western District of Washington,
Northern Division

JOHN KRISTIENSEN,

called as a witness on behalf of Respondents, having been duly sworn by the Notary Public, testified on behalf of Respondents by deposition as follows:

Direct Examination

By Mr. Franklin:

Q. Would you state your name, please?

A. John Kristiensen.

Q. Where do you live, Mr. Kristiensen?

A. 1505 West 60th, Seattle, Washington.

Q. By whom are you employed at the present time?

A. Alaska Steamship Company.

Q. In what capacity?

A. Chief mate.

Q. On what vessel?

A. The John W. Cullen.

Q. Are you presently planning to leave Seattle to be gone for an indefinite period of time on the Cullen?

A. Yes, sir.

Q. You do not know whether you will be back in Seattle when this case may be tried?

A. I do not know when I will be back, because we are making shuttling trips, and so on. The Army has the ships and you can never tell.

Q. Mr. Kristiensen, how long have you followed the sea?

A. Thirty-seven years.

Q. You have followed it all of your life?

A. Yes.

Q. Has your sea service included all oceans and all coasts?

A. Yes, sir. [227]

Q. How long have you been a mate?

A. Three years.

(Deposition of John Kristiensen.)

Q. How long have you been in the employ of the Alaska Steamship Company, approximately?

A. Since December, 1942.

Q. Who were you employed by before that?

A. Griffiths Steamship Company.

Q. Mr. Kristiensen, where were you employed in June, 1943?

A. Alaska Steamship Company.

Q. On what vessel? A. On the Flavel.

Q. In what capacity? A. Chief mate.

Q. Was the Flavel a new or old ship?

A. Well, it was practically a new ship.

Q. What type of ship?

A. A Liberty ship.

Q. What was she designed for in June of 1943?

A. Carrying troops. Of course they call it a combination freight and troop ship.

Q. Mr. Kristiensen, during the month of June, 1943, the latter part of the month, where was the Flavel? I will put it this way: was the Flavel in San Francisco during the latter part of June, 1943? A. Yes, that is right.

Q. What was the vessel doing there at that time?

A. She was loading cargo and troops for Alaska.

Q. Who had charge of the loading of the cargo on the vessel in San Francisco?

A. Lieutenant Hill. [228]

Q. What agency or branch of the service?

A. The Army.

Q. Did you as mate have anything to do with

(Deposition of John Kristiensen.)

the loading of the freight at San Francisco?

A. No, sir.

Q. Who was Lieutenant Hill?

A. He was kind of supercargo, I would call it.

Q. Was he in the Army?

A. Yes. He was a lieutenant in the Army.

Q. Did he remain with the ship after you loaded in San Francisco?

A. Yes, sir; he stayed right with it.

Q. Were you consulted in any way as to where the cargo should be stowed in San Francisco?

A. No, sir; I was not. I had nothing to do with the cargo.

Q. What did the cargo consist of, mainly?

A. Mostly explosives, ammunition.

Q. Do you recall what was loaded in San Francisco, in No. 3 hatch?

A. There was Jeeps and ammunition—"snow-birds", as they call them, or something like that. I think it was "snow-birds" they called them.

Q. Under whose supervision was that loaded?

A. It was loaded in San Francisco.

Q. But under whose supervision was No. 3 hatch loaded with the Jeeps and other equipment? Who had charge of loading No. 3?

A. You mean in San Francisco?

Q. Yes. A. The Army. [229]

Q. Did you have anything to do with it?

A. No, sir.

Q. Mr. Kristiensen, what troops did you carry aboard the vessel when you left San Francisco?

(Deposition of John Kristiensen.)

I mean what type of troops were they, the different branches?

A. Well, we also had a working detail.

Q. Were they soldiers or sailors or what?

A. Soldiers.

Q. Approximately how many soldiers?

A. Well, they had over eleven hundred, I know, but I really don't know how many there were.

Q. Did you have any Naval units aboard?

A. We had the amphibious crew and the armed guards.

Q. What was the duty of the armed guards?

A. They were there in case of air raid or submarines, or anything like that.

Q. They were permanently attached to the ship, were they?

A. Yes, they were permanently attached to the ship.

Q. Approximately how many amphibious troops did you have?

A. Well, about around fifteen or sixteen, I guess.

Q. Fifteen or sixteen?

A. Somewhere along there.

Q. Who were they in command of?

A. I don't really remember his name. Have you got his name?

Q. No; but was he a Naval officer?

A. A Naval officer, yes; an ensign, but I don't remember his name now.

(Deposition of John Kristiensen.)

Q. What is the function of amphibious troops on a troop ship; what do they do? [230]

A. They take the landing barges or take the stuff ashore; take the soldiers ashore for landing, and ammunition and all the stuff, you know.

Q. What equipment did the amphibious troops have at the time they left San Francisco; what equipment did they have aboard?

A. They had the landing barges to take care of.

Q. Where were they stowed?

A. Stowed on deck.

Q. Forward?

A. Both forward and aft; principally No. 4 and No. 2.

Q. Was there any other equipment belonging to the amphibious troops, to the barges, that was stowed on the forward portion of the vessel?

A. Yes. There was their equipment for landing barges there on the deck.

Q. What did that equipment consist of, generally?

A. Oh, there was tanks and bombs, smoke bombs, and rations.

Q. Where had those been loaded, and by whom?

A. That had been taken aboard in San Francisco by the Army.

Q. What was the number of smoke bombs loaded, approximately?

A. There was one for each barge, and we had eight barges.

(Deposition of John Kristiansen.)

Q. So there were eight of those distress smoke bombs? A. Yes.

Q. Would you describe how they were packaged, or what they came in?

A. They came in some carton, paper carton.

Mr. Levinson: You saw those on deck there?

A. Oh, yes.

Q. Did you ever see one of those bombs after the carton [231] was removed from it?

A. Yes; I saw them.

Q. Would you describe what the container of the bomb looked like after the carton was removed?

A. It is round. About that long (illustrating).

Q. "That long" means about what?

A. I don't know—

Q. Was it like a gallon can?

A. Yes. I would say about four inches, I guess, something like that, in diameter. Four or five inches or something like that in diameter. That is approximate.

Q. How long would you say it was?

A. Oh, about a foot or so.

Q. Was it a tin container? A. Yes.

Q. How was it stoppered or topped?

A. There is a screw to unscrew there. It is kind of a cap to unscrew.

Q. Mr. Kristiansen, what did you do with reference to stowing those smoke bombs off the deck?

A. They were lying in the water on the deck there, in the rain, and they were put 'way down in the forepeak.

(Deposition of John Kristiensen.)

Q. When did you do that, when you were in San Francisco or after?

Mr. Levinson: Do not lead the witness.

A. No; we did that up in Alaska.

Q. Was any other equipment besides the smoke bombs placed in the forepeak?

A. Yes. There was some of the rations, and malted milk, and stuff like that that was mixed in with it. [232]

Q. Do you know where the distress bombs were stowed in the forepeak? A. Yes.

Q. Where were they stowed?

A. They were on the starboard side in the forepeak.

Q. Would you describe what the forepeak on the Flavel was like from the time you would go down the ladder or manhole? Would you tell us just what it was shaped like? What was in the gear locker, first?

A. Well, you first walked down a wooden ladder, and there are some stanchions in the front there you have to walk around. While you are going down you have to walk on this side here, that is where the stuff was lying. On the other side the amphibious crew had the guns and stuff they were working on.

Q. We will come to that later. When you first descend into the forepeak what is the first locker you come to?

(Deposition of John Kristiensen.)

the forepeak after the cargo was stowed down there, before the fire?

A. I don't know that. I was up and down there lots of times.

Q. Who had charge of the cleaning up of the forepeak?

A. Well, that is what the sailors was doing.

Q. What particular individual?

A. The boatswain.

Q. Who had a key to the forepeak?

A. The boatswain.

Q. After you reached Alaska was anybody working in the forepeak other than members of the crew?

A. Yes; the amphibious crew.

Q. What were they doing?

A. They were putting the guns together, cleaning the guns.

Q. Where did the guns come from?

A. They came from—— [235]

Q. I mean were they guns on the landing barges?

A. They were guns for the landing barges, yes. They was boxed up, you know, and came aboard mixed in with the rest of the stuff that they picked out. Instead of being on deck I let them go down there and do it because it was dry down there, and wet and miserable on deck.

Q. Did anybody ask your permission to use the forepeak for that purpose?

A. Well, the amphibious crew ensign.

Q. Did you give it to him?

A. Yes.

Q. Approximately how long before did they be-

(Deposition of John Kristiensen.)

gin working before you had this smoke signal discharge up at Attu?

A. I don't know how many days but they were down there many days before that happened. They were down there quite a while.

Q. Were they working regular hours?

A. Well, no, they was not working any regular hours. They worked practically night and day, those fellows.

Q. Mr. Kristiensen, did Mr. Lubinski ever make any complaints to you after the amphibious crew began using the forepeak? A. Yes.

Q. What did he complain about?

A. He complained that they made too much mess down there.

Q. Whose duty was it to keep the forepeak clean and shipshape?

A. Well, really it should be his duty.

Q. Whose duty?

A. Well, the boatswain. He should have his gang to do it. [236]

Q. Who was the boatswain on this trip?

A. Lubinski.

Q. Mr. Kristiensen, were you on watch at the time the smoke distress bomb discharged at Attu?

A. No.

Q. What time of night did it occur?

A. Around ten o'clock, near ten o'clock.

Q. Where were you at that time?

A. I was in my room.

Q. When had you gone off watch?

(Deposition of John Kristiansen.)

A. Eight o'clock I go off watch.

Q. How was your attention directed to that event?

A. They told me there was a fire in the forepeak.

Q. Who told you?

A. I don't remember. It was the third or second mate, either one of them.

Q. What did you do?

A. I went out and got up there and put the fire hose on it.

Q. I beg your pardon.

A. I went up there and we got the fire hose on it.

Q. What did you see when you got up in the vicinity of the forepeak? A. I saw smoke.

Q. Where was it coming from?

A. Coming out of the forepeak.

Q. Were any of the merchant crew there at the time? A. Yes.

Q. Who was there? Let me simplify it; was Mr. Lubinski, the boatswain, there?

A. He was there. [237]

Q. What orders, if any, did you give Lubinski about going into the forepeak and fighting the fire?

A. I didn't give him any orders. He volunteered to go down there.

Q. Do you know what equipment he used before he went down there?

A. Yes. He put the mask on, the gas mask on.

Q. Do you know whose gas mask it was?

(Deposition of John Kristiensen.)

A. Yes. I think it was mine.

Q. Mr. Kristiensen, who issued you that gas mask?

A. The Army.

Q. When?

A. In San Francisco. I think I got it from Hill, the lieutenant there. They dished them out. All the crew got one, everybody.

Q. Was Lieutenant Hill with you at Attu?

A. Yes.

Q. He made the entire trip with you?

A. Yes; right down until we got back here. He went even down to Honolulu with us.

Q. Did you have other gas masks available besides the ones issued by Hill?

A. Yes. We had the gas masks that belonged to the ship, but that was only one or two of them.

Q. Would you describe your gas mask, just roughly, what it looked like?

A. It was one of those long ones that screw on in the front.

Q. What is it made of?

A. It was some kind of canvas. It was rubber and— [238] it was rubber.

Q. How did it fit, over the head?

A. They fit me fine and dandy.

Q. What was used about the eyes in the composition of the mask?

A. Kind of goggles, like, and glasses.

Q. Was your gas mask that Mr. Lubinski borrowed defective or in good condition?

(Deposition of John Kristiensen.)

Mr. Levinson: He doesn't know. He never used it.

Mr. Franklin: He will testify about that.

Mr. Levinson: Afterwards.

Mr. Franklin: He went down at the same time.

Q. Was it in good condition? A. Yes.

Q. How long did Mr. Lubinski stay down there, according to your recollection?

A. Oh, about five minutes.

Q. And then what happened?

A. He came up and said he couldn't see nothing.

Q. Then what did you do?

A. I was down there for about a couple of minutes and I couldn't see nothing.

Q. What gas mask did you use?

A. The same one.

Q. How long were you down there?

A. About a couple of minutes was all I was down.

Q. Then after you came up did Mr. Lubinski borrow your mask again? A. Seather.

Q. The third officer? [239]

A. No; the second officer.

Q. Did Lubinski go down again to your knowledge, after the first time?

A. I am not sure of that.

Q. Did you remain on deck until the bomb was discovered? A. Yes.

Q. Did you see the bomb after it was discovered? A. Yes.

(Deposition of John Kristiansen.)

Q. Where was the bomb when you saw it?

A. It was up on deck.

Q. Just describe the appearance of the container and the tin?

Mr. Levinson: Who brought it up, do you know?

Q. Do you know who brought it up?

A. No, I do not. I don't remember who brought it up. I found it behind the ladder.

Q. Describe what it looked like when the bomb was brought to the deck.

A. It was burned, and a hole in it.

Q. Where was the stopper or plug?

A. I don't know. It was all burned up.

Q. Was it on the distress bomb—

Mr. Levinson: Do not lead the witness. He just told you he didn't know where it was. He said it was all burned up.

Q. Was there any evidence of the stopper still in the bomb when you examined it on deck?

Mr. Levinson: That is still leading, and I object to the question.

Mr. Long: Do you insist upon the objection?

Mr. Levinson: No.

Q. Would you answer the question?

A. I don't know, because all I saw was that there was a hole in it. It burned up and melted.

Q. Mr. Kristiansen, do you know of your own knowledge who was in or using the forepeak just before the alarm was sounded?

A. The amphibious crew was down there.

Mr. Levinson: Just a moment. The question was

(Deposition of John Kristiensen.)

do you know of your own knowledge. The witness was in his room at the time, I understand.

Mr. Franklin: We will find out.

Q. (By Mr. Franklin): Do you know of your own knowledge? The rest of the men, I understand, had been down there.

A. I don't know of anybody else that had been down there.

Mr. Levinson: You cannot tell that.

Q. Did you make an investigation of this occurrence after it happened?

A. Well, I understand——

Mr. Levinson: You cannot tell what you understand.

A. Other than that I don't know.

Q. Mr. Kristiensen, at ten o'clock, or at the time this bomb escaped from its container, were any of the hatches working?

Mr. Levinson: That is assuming that it did. You do not know.

Mr. Franklin: Certainly; that is what obviously happened.

Mr. Levinson: I object to the form of the question, asking him if at ten o'clock any of the hatches were [241] working, and then putting in preliminaries.

Q. Do not pay any attention to counsel, Mr. Kristiensen, because he makes his objection and it goes in the record. That is without any disrespect to my colleague here. You just answer my question. I will ask that the question be read.

Deposition of John Kristiensen.)

(Last question read.)

Mr. Levinson: In order to be perfectly fair to the witness and fair to both sides, why don't you ask him what happened at the time, without describing what you think may have happened at ten o'clock?

A. I don't know if they were working or not.

Mr. Franklin: That answers everything.

Mr. Levinson: Except it does not answer my objection to the form of the question.

Q. Mr. Kristienson, how long were you present in the forepeak from the time the gas first escaped until you returned to your quarters?

Mr. Levinson: I think that is an ambiguous question. I do not understand it myself. He was notified after the fire started.

Mr. Franklin: And I want to know how long he was at the forepeak until he returned.

Mr. Levinson: That is not what you asked. You asked him how long after it started.

A. I don't know. I can't tell. It took about twenty minutes or half an hour. That I am not so sure of, but I think I had it down in the notebook.

Q. Mr. Kristiensen, how long were you exposed to the fumes and the smoke in the forepeak when you were down there?

A. How long I was exposed? [242]

Q. Yes.

A. I said I was down there two minutes, that's all. I didn't care to stay down there any more. It was a terrible smell to it.

(Deposition of John Kristiensen.)

Q. Did you suffer any irritation or pain in your eyes from that exposure?

A. No, sir. It didn't affect my eyes or anything.

Mr. Levinson: It didn't what?

A. It didn't affect my eyes or anything, but—

Mr. Levinson: But what? You started to say something else.

Mr. Franklin: He didn't say anything.

Mr. Levinson: Did you, Mr. Kristiensen? Did you start to make some explanation?

A. The smell, that is all.

Q. What effect did the smell have on you?

A. Well, like I wanted to throw up, or something.

Q. It made you sick?

A. It made me sick. I couldn't stand the smell.

Q. Did any of the other men who went below to assist in locating the escaping smoke bomb make any complaint to you, as mate, that their eyes were irritated from exposure to the smoke?

A. No.

Mr. Levinson: Was there any other man besides Sather? A. No.

Mr. Franklin: The answer is "no."

Mr. Levinson: Just a minute. Was there any other man besides Sather? [243]

Q. How many men were down there, to your knowledge, in number, attending to locating or putting out the fire in the forepeak?

A. Sather and Gil.

Q. That is Gil Erickson?

Deposition of John Kristiensen.)

A. Yes. And then there was this Navy gunnery officer was down there. He also was down there.

Q. Anybody else besides Lubinski and Erickson?

A. Well, I don't know. There must have been some more, I guess.

Q. Did any of those men, including Lubinski, make any complaint to you immediately after the accident that their eyes had been affected and irritated by exposure to the fumes? A. No.

Q. Mr. Kristiensen, what time did you reach Miska on the morning of August 15, 1943?

A. It was around six o'clock in the morning when we dropped anchor.

Q. Were you on watch at that time?

A. Yes.

Q. Do you remember anything happening about 0.3 hold that morning? A. Yes.

Q. What occurred there, unusual?

A. Well, one Jeep took fire.

Mr. Levinson: Just a minute; I object unless he was down there.

Mr. Franklin: He was there.

Mr. Levinson: Did you see the fire start? [244]

Mr. Franklin: Never mind——

Mr. Levinson: Wait a minute——

Mr. Franklin: Do not answer anything until he get through with this. Will you make your objection, Mr. Levinson?

Mr. Levinson: My objection is that he is speaking obviously from hearsay. If this man was there the proper way is to ask him if he was there when

(Deposition of John Kristiensen.)

the fire started, and if he was there then he can tell what he observed. If he came afterwards, or was called there, he cannot tell how it started, except what somebody told him.

Q. Did you fight the fire yourself?

A. Yes, sir.

Q. Did you see what was burning?

A. No, I didn't see what was burning until after the fire was out.

Q. After the fire was out did you see what was burning?

A. Then I saw what was burning, yes.

Q. What was burning?

A. A Jeep, and all the belongings, all the clothes. They called it a "snow-bird."

Q. It operates on snow, doesn't it?

A. Yes.

Q. During the morning preceding the fire what was being done on board the ship at Kiska?

A. Discharging.

Q. Discharging what?

A. Well, Jeeps, or "Snow-birds," and all different stuff.

Q. When did the soldiers leave? [245]

A. They started around nine o'clock, or nine or ten o'clock, around there.

Q. How did they get ashore?

A. On landing barges.

Q. Who ordered or gave instructions as to which cargo was to be removed?

A. The Army.

Q. Who in particular?

Deposition of John Kristiensen.)

A. Lieutenant Hill.

Q. What did you have to do with ordering or having any control over what cargo was removed?

A. I didn't have any real control of it, unloading any cargo.

Q. What individuals were discharging the catches? A. The soldiers.

Q. Were any of the merchant marine crew used for that purpose on the morning of the Kiska invasion? A. No, sir.

Q. Who called your attention to the fire?

A. The second mate, I believe it was.

Q. What did you do?

A. I went and got the fire hose out.

Q. When you came to No. 3 hatch what did it look like?

A. I couldn't see nothing but smoke.

Q. Then what did you do?

A. I got the fire hoses out and put water in them.

Q. Where did you go?

A. I went down in the 'tween deck myself, with the boatswain.

Q. What did you use to go down? Did you have any mask? A. Yes; I had a mask on. [246]

Q. How long did you remain in that 'tween decks?

A. I was down there for about fifteen minutes, somewhere around there.

Q. How long before the fire was put out?

A. About half an hour.

(Deposition of John Kristiensen.)

Q. Where was the fire burning, from what you could see?

A. I couldn't see where it was burning at that time because there was too much smoke. There was no fire, but just smoke.

Q. What did you do about putting out the fire, personally? A. Put water on it.

Q. What happened after that with reference to the smoke?

A. What happened after the smoke?

Q. No. Did you succeed in getting the smoke out?

A. Well, yes, after we got underneath with the hose and they hit what was burning there. It kind of calmed down and we could see a little bit, and then we went down in the lower hold.

Q. Were you wearing your mask all the time?

A. Yes.

Q. When you got down in the lower hold what did you find?

A. I found that "snow-bird" was the one that was burnt—had burned up. All the clothes was burned up.

Q. Describe what clothes were burned in it.

A. A rug bag and cushion.

Mr. Levinson: A sleeping bag?

A. No. The box they have their clothes in, that they pack in on their shoulders.

Q. Barracks bags? A. Yes. [247]

Mr. Levinson: Knapsacks?

Mr. Franklin: No; they are barracks bags.

Deposition of John Kristiensen.)

Q. Blue denim?

A. No; the canvas bags that they pack.

Q. How much of the Jeep was burned?

A. Well, most everything was burned that could be burned, except the steel.

Q. How long were you down in the lower hold where you were able to get down there?

A. About five minutes. I wasn't down there very long because then everything was under control, so I went up again. But Benz and Erickson was down there.

Q. Who did you see, or what AB's did you see down in the hold fighting the fire?

Mr. Levinson: The lower hold or the 'tween-decks?

Mr. Franklin: Either the lower hold or the 'tween-decks. A. In the lower hold, Benz.

Q. He was an AB? A. Yes.

Q. Did you see the boatswain, Lubinski, down there?

A. I can't remember if I saw him. I wouldn't know if he was not down there, and at the same time I don't know anything about it. But I cannot recollect him.

Q. Do you know the cause of the fire?

A. Well, as I was told——

Q. Never mind. You do not know of your own knowledge? A. I was told——

Mr. Levinson: You cannot tell that.

A. It was started in the Jeep down there. [248]

(Deposition of John Kristiensen.)

Mr. Franklin: We will prove that by other testimony.

Q. (By Mr. Franklin): Mr. Kristiensen, did you wear your Army mask at the Kiska fire, or your ship's mask?

A. The one I was given out by the Army.

Q. Did you suffer any irritation in your eyes from the smoke? A. No, sir.

Q. Did Mr. Benz or Mr. Erickson or Mr. Sather wear masks when they were down in the hold fighting the fire? A. Yes.

Mr. Levinson: So far he said Benz was down there.

Q. What officers were down there?

A. Erickson was there.

Q. What officers were in the hold, in addition to the seaman Benz, fighting the fire—anybody else?

A. I don't know, but I remember Erickson was there.

Q. Did either Mr. Erickson or Mr. Benz complain to you about suffering from smoke irritating their eyes?

A. They made no complaint to me.

Q. Did Mr. Lubinski ever make any complaint to you about losing the sight in his left eye?

A. Well, that was after——

Q. Just answer; did he ever make any complaint to you about his eyes?

A. Yes, he made a complaint.

(Deposition of John Kristiensen.)

Q. When was that complaint made with reference to the fire at Kiska?

A. Well, that was a while afterwards, but I don't know how many days afterwards.

Q. Did he make any statement as to what caused the trouble with his eye at the time? [249]

A. No. He didn't make any complaint about where it came from. He said he had a sore eye.

Q. And his eye was sore?

A. Yes, it was; sure.

Q. No question about that?

A. No. Of course the doctor knows more about that. He was the one that attended to him.

Q. Did you send him to the doctor?

A. No, sir. He went to the doctor himself. Any time there was anything wrong they went to the doctor and he took care of them.

Mr. Franklin: That is all. Thank you.

Cross Examination

By Mr. Levinson:

Q. Mr. Kristiensen, are you married?

A. Yes, sir.

Q. Your home is in Seattle? A. Yes, sir.

Q. Had you worked for the Alaska Steamship Company before you went to work for them in 1942? A. Yes. In 1926, I guess it was.

Q. You have had your papers for a long time?

A. I was in one of their ships for three or four months. Of course I sailed before the mast in those ships, off and on.

(Deposition of John Kristiensen.)

Q. Mr. Kristiensen, you were the first mate of the Flavel at the time of this voyage in question?

A. Yes, sir.

Q. And as such first mate you were in charge of the safety [250] of the ship during the time you were on watch and during the time you were on duty?

A. Yes.

Q. And as such you exercised general supervision over the entire vessel during your watch?

A. Yes. That is, when we are running and sailing and so on, when we are out to sea. Of course when I have the watch on deck I am responsible if there is nobody over me. If the skipper is there he is responsible.

Q. And your duty relates to the condition of the ship, both for the safety of the ship and for the safety of the personnel, that is, the members of the crew; that is right, isn't it?

A. Yes, sir.

Q. And that was a constant duty while you were on the ship?

A. Yes.

Q. Particularly while you are on watch, I should say.

A. Yes.

Q. You informed us that the Army was in charge of the loading of the holds of the vessel?

A. Yes.

Q. The Army had nothing to do with where you loaded your own ship's stores, or wherever you carried your ship's supplies? That is the job of the ship's officers?

A. The stores belong to the ship, yes.

Q. And you tell where they should be put?

(Deposition of John Kristiensen.)

A. Yes.

Mr. Franklin: On this voyage, you mean?

Mr. Levinson: On this voyage.

A. The stuff that belongs to the ship, like gear, out [251] I have nothing to do with the loading or unloading of the ship.

Q. Where is the spare gear kept on that ship, with relation to the booms and blocks?

A. That is kept in the lockers or storerooms. We also had some more storerooms in the ship where we kept gear. And the ropes they had up in the forepeak, all the rope.

Q. You also kept some of the gear up in the forepeak, did you not?

A. Yes, sir; off and on—odds and ends. But we had most of the gear in the storeroom amidships, or in the No. 2 mast house.

Q. The forepeak, of course, is designed primarily to keep the ship's gear in? You do not usually carry any cargo in there, do you? A. No.

Q. And the gear that the boatswain would call for, for instance if he had to repair a block or get some tools to assist in that repair, that usually comes from the forepeak, doesn't it, up in the carpenter shop?

A. Yes. He might have to go there for them.

Q. Certain kinds of wrenches are kept up there, aren't they?

A. Yes. Some there and some other places.

Q. That is common knowledge, of course, with the officer in charge, that the men were constantly

(Deposition of John Kristiensen.)

going in and out of there, looking for various parts of the ship's equipment they might need in the course of their work? Not constantly, but at least frequently. A. Yes, that is right.

Q. If the boatswain needs any tools or special equipment [252] that is in the forepeak it is nothing unusual for him to send men up forward to get it? A. No.

Q. That is his duty, in fact?

A. That is right.

Q. When you observed these smoke bombs and the food supplies which were stored on the deck it was your own suggestion or your order that they be placed in the forepeak to get them out of the weather.

A. Yes. That is the only place we had to put them. Lockers were very scarce aboard because they had everything filled up that they possibly could.

Q. However, it could have been possible, I assume, to have so stowed those on deck by covering them with canvas so they could be fairly secure and dry? That could have been done?

A. Well, they didn't have any so that it really could have been done. Of course it was rainy, and taking water over.

Q. It could have been done if they had the canvas or equipment on the deck?

A. But they didn't have any canvas to do that with. They didn't have any spare tarpaulins or anything.

Q. They didn't have any spare tarpaulins?

(Deposition of John Kristiensen.)

A. All the tarpaulins we had was on the hatches. We didn't have enough to put canvas over the soldiers. It was leaking through there where the fellows was sleeping. It was getting wet because it was leaking through the hatches.

Q. You didn't even have enough tarpaulin for the—— [253]

A. They had to get some tents from No. 2 hold to cover up No. 1 to stop the leak.

Q. In other words, if the ship had been properly equipped you would have had enough tarps?

A. Yes; if we had some spare ones. But you know how it is, the ship was fitted out as a new ship and they didn't have more than just enough tarps for the hatches, and that was very poor.

Q. Normally you should have spare tarps as part of the ship's equipment, particularly on a long trip like that?

A. Really there should have been, yes.

Q. And that is usually put on before the ship leaves?

Mr. Franklin: Are you referring to an invasion trip like this was, or generally?

Mr. Levinson: You can take him on redirect and do whatever you want to.

Mr. Franklin: But I do not think the witness understands you.

Mr. Levinson: If he doesn't understand me he is sufficiently intelligent to ask me.

Mr. Franklin: In other words, you are talking about one thing and he is talking about another.

(Deposition of John Kristiensen.)

Mr. Levinson: Let us see if we are. Read the question.

(Last question read.)

Q. (By Mr. Levinson): Those tarps are usually put on before the ship leaves?

A. We had a full complement of tarps, and that would be enough for the hatches, because I never figured any canvas for covering up things. In an old ship we [254] have old tarpaulins and we can cover up things. A ship that has been running for any length of time they always have some spares. But this was a new ship. We had enough tarpaulins for all the hatches—supposed to be, so they should be sufficient.

Q. It is good seamanship to usually have some spare tarps; isn't that correct, Mr. Kristiensen? That is, whoever sees to the supplying of the ship—it may not be the mate's job——

A. I am the one that is really supposed to order things, but so long as they had enough for the hatches that is all I care for, that there should be enough. But I don't know.

Q. Then if you had had some spare tarps you would not have had to put these supplies up in the forepeak where you kept the stores?

A. Well, we could have covered it up around there some place, I guess.

Q. Didn't the boatswain or some of the men make comment about that, that they should have been covered up? A. No.

(Deposition of John Kristiensen.)

Q. As a general rule you do not carry any freight in the forepeak, do you?

A. No, sir; and there was no freight, either, exactly.

Q. Well, cargo, then?

A. No, there was no cargo.

Mr. Franklin: Ammunition?

A. No; there was no ammunition.

Q. Smoke bombs?

A. You cannot call that ammunition, because that is why we [255] have lifeboats. They have them in the lifeboats for distress.

Q. The smoke bombs?

A. Yes. We have them in the lifeboats. They put them on the water at sea, and in case we are in distress some ship can see them. That is what they are for.

Q. If they are used for your lifeboats they are stowed right in the lifeboats?

A. They are stowed right in the lifeboats. They are in the lifeboats now.

Q. But these were extra for the amphibious boats? A. Yes.

Q. They had nothing to do with your lifeboats?

A. They were for the landing barges.

Q. They were carrying the landing barges as cargo at that time?

Mr. Franklin: Ammunitions.

A. Well, you could call them cargo. It was equipment for landing. I cannot really see how that is

(Deposition of John Kristiansen.)

cargo, either. Which way you take it I don't know. I wouldn't take it for cargo myself.

Q. Mr. Kristiansen, if they were to be used as smoke bomb signals for landing barges they normally should be stowed in the landing barges like the smoke bombs are stowed in the lifeboats?

A. Yes. When they did not put them there they were lying on the deck.

Q. So you decided to put them in the forepeak?

A. Yes. All the food was lying around there. I thought it was a shame for it to be lying around. And also the [256] smoke bombs with it. It was all lying there and would get spoiled; malted milk and biscuits and crackers, and all that stuff. It was all mixed together.

Q. Who did you direct to put this stuff in the forepeak?

A. I told the boatswain about it.

Q. Did you tell him exactly where to put it, or just tell him to stow it there?

A. I told him to put it down there some place. I didn't tell him exactly where to put it. I told him to put it down there somewhere in the forepeak.

Q. Did he make any objection to putting it in the forepeak, saying there wasn't any room?

A. No, he did not.

Q. Of course if he is in the ship's crew he doesn't make any objection to what the order is, does he?

A. No.

Q. What kind of a sailor was Lubinski? Did he seem to be a pretty good sailor?

A. Oh, I wouldn't brag about him.

(Deposition of John Kristiensen.)

Q. Well, he seemed to know his business?

A. Well, I don't know. It was the first time he had ever been boatswain, and I don't think he knew much about it.

Q. He always seemed to be willing to follow his orders and try to do the best he could?

A. He was pretty good in the messroom, sitting talking in the messroom.

Q. Did you have any complaints about his work on the deck?

A. That was not out very much.

Q. Did you ever complain about it or reprimand him?

A. No. [257]

Q. Or ask him about it?

A. Well, once in a while I had a little argument with him.

Q. On a number of occasions?

A. Oh, a couple of times.

Q. Of course you could always replace him if he wasn't doing his duty, or report him to the skipper and the skipper could replace him?

A. You cannot replace anybody when you are out.

Q. You could replace him with some other man?

A. No.

Q. The skipper could?

A. No.

Q. He could do that to one of the officers, if necessary, couldn't he?

A. In a case like that, when you are out at sea like that, you cannot do anything until you get in port.

Q. How much space was there between the

(Deposition of John Kristiensen.)

hatchway, or the companionway, down into the lower forepeak, and the carpenter's bench on the starboard side of the forepeak, on that deck? How much space was there, about?

A. Just about a narrow space to walk.

Q. It would be about how wide?

A. About a couple of feet.

Q. And these smoke bombs were stowed under the bench and some on top of the bench?

A. No, none on top of the bench. They was just put on the floor. There wasn't so very much of it.

Q. Under the bench?

A. Some was put underneath. Some was outside.

Q. In other words, a man in walking along that passageway [258] would have to walk around or over the smoke bombs?

A. No. He could walk on both sides of the hatch. There is a hatch right in the center and you could walk there. And there was nothing on the other side.

Q. On the port side?

A. On the port side there was nothing.

Q. On the starboard side where the bench was, that is where the carpenter kept some of his tools?

A. No. The carpenter shop is in the after part.

Q. In the after part of the forepeak?

A. Yes. There is a carpenter's bench there, it seems to me like, for the carpenter to work on. Of course he never did any carpenter work on it, but it looks like a carpenter's bench. The carpenter shop is in the back there.

(Deposition of John Kristiensen.)

Q. Aft of it?

A. Yes. But for any long stuff you cannot get it in there because the door is too small, if there was any long lumber or anything like that.

Q. Where would a man go to get wrenches in the forepeak? Where were they kept?

A. We had some wrenches in there all right, but they didn't fit. They was too small, those wrenches we had in there. I don't know where they belonged. They didn't fit, anyway, most of the wrenches we had in there. The boatswain had some in his room, and the winch driver had some in his room.

Q. Were there a few wrenches up there?

A. He fitted saws and things like that up there, and had some marlin spikes there, and so on. [259]

Q. If a man was sent up to the forepeak to get a wrench or some equipment how would he go? Would he have to go either one side or the other?

A. He could go on both sides, but as a rule he would walk on the port side because that is the closest to the door. The door is over on that side.

Q. And it was also clear?

A. If he walked on the other side he had to walk over this way (illustrating).

Q. Around the hatch? A. Yes.

Q. However, those passageways were designed originally so they could use either side?

A. Yes; because there was a locker in the after part there. There is a locker in the after part.

Q. Could that be reached from either the star-

(Deposition of John Kristiensen.)

board or port side, or was the locker on one side or the other?

A. The locker was on the starboard side. There is no locker on the other side; just shelves for ropes on the other side.

Q. In order to get into that locker for some of these tools it would be a little closer to walk on the starboard side?

A. No. Oh, you mean to get into the locker?

Q. Yes.

A. Yes. To go into that locker it would save a couple of steps.

Q. Who granted permission for the men in the amphibious crew to work in the forepeak?

A. I did. [260]

Q. And the request came from the Ensign, or the man in charge?

A. Yes, sir.

Q. How long before the fire did you grant that request? That is, the fire in the forepeak?

A. Well, I don't know. They were working there for quite a while before that. They were almost finished when that started. They were just about finished.

Q. During the time those men were working there of course the crew had occasion to go into the forepeak to get some of their material once in a while, didn't they?

A. Yes.

Q. You said something about a key. The boatswain has a key to the forepeak?

A. Yes. He had a pass key for all the lockers.

Q. Suppose he sent a man up forward to get

(Deposition of John Kristiansen.)

some material, did he give him the key or was the locker open?

A. When those people were working there it was open all the time.

Mr. Franklin: By "those people" you mean the amphibious crew? A. Yes.

Q. On the day of the fire do you know if it was open, on July 15th?

A. Yes, I guess it was. I am not sure, but it must have been open.

Q. The boatswain had nothing to do with the loading of these bombs forward, except carrying out your orders? A. That is all.

Q. He didn't grant permission or he didn't suggest that they be moved up there? [261]

A. No. They were put there because he didn't want any more work than he had to.

Q. The boatswain didn't grant the permission for the amphibious crew to work in the forepeak, because he has no authority—that is up to you, isn't it? A. Yes.

Q. The first notice you had of the fire you were up in your room? A. Yes.

Q. And when you came down there was a lot of smoke coming out of that forepeak?

A. Yes.

Q. And you didn't know what was burning?

A. No.

Q. No one knew?

A. I couldn't make out what it was. I couldn't understand it. It was kind of a funny smoke, and

(Deposition of John Kristiensen.)

it smelled awful, and I couldn't make out what it would be.

Q. Did it occur to you at that time that it might have been the smoke bombs?

A. Yes. I began to think it must have been one of them.

Q. You thought about it afterwards, but at that time did that occur to you?

A. Well, yes, at that time I came to think about that. I told them it must be a smoke bomb. I told them to cut that water out because there was no fire. I had been down there and looked around and I couldn't see no fire.

Q. They had already been down there when you got there? A. No. [262]

Q. When did they go down?

Mr. Franklin: He said he went down.

Q. Did you say you went down and saw no fire?

Mr. Franklin: He said he went down and then returned and ordered the water off.

A. That was after they had been down there looking around. They had been down, and I told them there was no use to have that water, to shut the water off, because the forepeak would be full of water, and there was no fire around. I couldn't see no fire anywhere.

Q. When you got there were they pouring the water in the forepeak?

A. No, no. I got there the same time as the rest of them, and they had just got the hose ready and started to put water down.

(Deposition of John Kristiensen.)

Q. Who suggested going down to find out what the trouble was?

A. Lubinski was the first one going down there.

Q. It was necessary to go down to find out what the trouble was? A. Sure.

Q. Did you give him your mask? A. Yes.

Q. Were there any other masks on the ship?

A. Well, there was one more mask there. I don't know whose mask it was, but there was one more mask.

Q. And Lubinski took the mask and went below?

A. Yes.

Q. And he was down there how long?—about five minutes, you say? A. Approximately.

Q. Of course you didn't keep a watch on him?

A. No.

Q. When he came up did he say whether he could find anything?

A. He couldn't see anything.

Q. He apparently was down there a full five minutes?

A. He said he couldn't find anything. He had been down in the lower forepeak and all around, and he couldn't see anything anywhere. And then I went down there.

Q. Were they still pouring water in it?

A. Yes.

Q. And things were probably floating around?

A. I couldn't see anything. Sather went down.

Q. You were down there about two minutes?

A. Yes; somewhere around there.

(Deposition of John Kristiensen.)

Q. And then Sather went down there?

A. I wasn't there very long.

Q. It was not very pleasant down there?

A. No; I will say not.

Q. And then Sather went down? A. Yes.

Q. How long was Sather down there?

A. Well, he wasn't down there very long, either.

Q. About the same time you were there; a couple of minutes? A. Yes.

Q. Did he take your mask or did he have his own?

Mr. Franklin: Did who?—Sather?

Mr. Levinson: Sather. A. Yes.

Q. He took your mask?

A. Yes. Then this gunnery officer went down.

Q. Whose mask did he take?

A. My mask.

Q. The only mask that was there was your mask?

A. Yes. Well, there was one more mask there.

Q. Who used that?

A. I don't know who used it, but there was another mask, because I picked it up when it was lying around there afterwards. Somebody said it was the wireless operator's. Somebody said that. I don't know. I even put a mask in my room after that. Nobody came and claimed it.

Q. When Lubinski went down he went down, of course, for the purpose of finding out what caused the fire? A. Yes.

(Deposition of John Kristiensen.)

Q. After Sather went down that is when you decided to stop pouring water in there?

A. Yes.

Q. In the meantime there had been a lot of water, and everything was floating around down there?

A. Yes. There was lots of water down there.

Q. Do you know if Lubinski went down again, afterwards?

A. Yes, he was down there a couple of times that I know of.

Q. Where were you when he went down after the first time? A. I was up on deck.

Q. Did you see him go down? A. Yes.

Q. He also had your mask again?

A. I imagine so. I don't know. I am not sure whether he used this one or the other one, but I know the first time he had my mask.

Q. The second time you don't know whose mask he used? [265] A. No.

Q. And the smoke was still coming out of the forepeak? A. Yes.

Q. As a matter of fact, it was Lubinski who finally brought that smoke bomb up?

A. I don't know.

Q. Somebody brought it up?

A. Somebody brought it up. Somebody found it back of the ladder there.

Q. Back of the carpenter shop?

A. No. Practically right down below—right in the hold there.

(Deposition of John Kristiensen.)

Q. That was not where it was stowed originally, was it? A. No, it was not stowed there.

Q. So it must have been floating around?

A. No; there wasn't that much to float it around. Somebody had been moving it.

Q. Somebody must have kicked it around after looking for it?

A. Somebody must have packed it up there to investigate it. They wouldn't kick it to find out what was inside of it, or take the cap off. Any time they get air into them they start to smoke.

Q. That is your theory—you didn't see what they did—you don't know?

A. I don't know, but that is the only way it could have happened.

Q. When you saw the bomb, you testified in your direct examination, it was all burned up?

A. It was burned up, yes.

Q. You do not know whether the cap was off or not? [266]

A. I wouldn't take fire any other way. Somebody must have monkeyed around with it.

Q. It is possible the cap might not have been screwed on right, and somebody knocked it over and the cap came off?

A. If they kicked it from below, from that bench up to that ladder, they must have played football with it. I don't know.

Q. It is possible if that cap had been loose that the jar of knocking it over would have loosened it and knocked it off? It is just a screw cap?

(Deposition of John Kristiensen.)

A. Yes, it is a screw cap, but it is not that loose. If they threw that carton all around the cap wouldn't come off.

Q. You don't know what kind of a mask or whose mask Lubinski used the second or third time he went down?

A. No. There was a man that had that mask, so I don't know.

Q. Were you there when Lubinski brought it up, or anybody brought it up, the bomb?

A. I can't remember, but I saw the bomb there.

Q. That was after the fire was out?

A. It was lying there behind the ladder, but who brought it up I don't know.

Q. You only know what you were told?

A. That is all.

Q. Any information you have as to where it was found is what someone told you? A. Yes.

Q. And you saw it on deck?

A. I saw it on deck, yes. [267]

Q. And the fire was out when you saw it?

A. Yes. Still smoking down there.

Q. The bomb was not still smoking?

A. No. The smoke was coming up. It was chock full of smoke down there. Of course the bomb didn't smoke any more.

Q. Do you know if there was any complaint by Lubinski to anybody about his eyes between the first fire and the second fire? A. No.

Q. About how often would you see Lubinski?—every day? A. Yes.

(Deposition of John Kristiensen.)

Q. Did he seem to do his work all right during that time? A. Yes.

Q. You didn't examine his eyes, or anything, during that time?

A. No, I didn't examine him. He went to the doctor.

Q. Do you know whether he went to the doctor during that time?

A. That is what he said. He went down there and the doctor gave him a shot. That is what he told me.

Q. He went down there to see the doctor?

A. He went to the doctor every day.

Q. After which fire?

A. After the Kiska fire. I don't know how many days after the Kiska fire. I don't know that.

Q. Did he ever tell you he had gone to see the doctor before the Kiska fire?

A. No. Not about his eyes, no.

Q. Do you know if he went to see him about anything else? [268]

A. I think he said he was sick, or something, or had a cold.

Q. Where were you when the fire started at No. 3 at Kiska? A. In my room.

Q. When you were notified of the fire what did you first see when you came out of your room?

A. I saw smoke.

Q. How many men of the crew were around the hatch when you got there?

A. Oh, everybody was around there.

(Deposition of John Kristiensen.)

Q. The skipper was there?

A. They were all on deck. Everybody was there.

Q. Were any of the hoses broken out yet?

A. No, but we got busy on them right away.

Q. Who mans the hoses, do you know?

A. Oh, all hands.

Q. All of the crew; all of the sailors?

A. Yes.

Q. The destroyer came alongside a little later?

A. Yes.

Q. And you got a hose from the destroyer, too, didn't you? A. Yes.

Q. Up to the time the destroyer was there you were using the regular ship's hose? A. Yes.

Q. How long after you got there before you went down to the 'tween-deck? A. What?

Q. You got there first, you got on the main deck and saw the fire coming out through the hold? [269]

A. Yes.

Q. And then you told Mr. Franklin you were down in the 'tween-deck?

A. I went down there. I went down to the door in the 'tween-deck.

Q. You went down through the manhole?

A. No. I went down in the crew's quarters. There is a door going into No. 3, and I went in that door there. I had a hose down there when I could get underneath the hatch coaming.

Q. So you could play the hose under the 'tween-deck?

A. Underneath the deck, you see, because when

(Deposition of John Kristiensen.)

you stay up there you couldn't get anything underneath. You go right down the hatch, and that is no good.

Q. Were any of the men down in the hold at the time you started to work your hose from the 'tween-deck?

A. No. They went down there all right, but there was so much smoke I couldn't see, but after it cleared up I saw Erickson and Benz down there, and the two soldiers.

Q. You don't know how many had gone down there before?

A. I don't know if there had been anybody down there except them fellows.

Q. Did you ever see Lubinski down there?

A. No.

Q. You don't know whether he was down there or not?

A. I do not; no.

Q. Do you know if any of the Steward's gang were working the hold with the hose?

A. No.

Q. Wasn't there a couple of the colored waiters handling [270] the hoses, too?

A. There might have been.

Q. There was a lot of confusion around there, like at any fire?

A. I wasn't up on deck. I was down in the 'tween-deck most of the time. I don't know what was going on up on deck.

Q. There had been hoses on the main deck?

A. Yes. There was a bunch of them standing up

(Deposition of John Kristiensen.)

there on deck with hoses. Who they were I don't know because I wasn't up there.

Q. They were playing the water into the hold?

A. Yes.

Q. There were also some men in the hold, and you don't know who they were?

Mr. Franklin: He didn't say that.

A. Yes; I knew who was in the hold.

Q. You knew Benz and Erickson were there, and a couple of soldiers? A. Yes.

Q. But you don't know that Lubinski was down there?

A. If he was the smoke was so thick I couldn't see him.

Q. The smoke was so thick for a while you couldn't see him? A. Yes.

Q. After this fire, that is when Lubinski started complaining about his eyes? A. Yes.

Q. You don't know whether he had a mask on when he went down or not? A. No.

Q. You don't know whether the mask was knocked off of him [271] when he went down or not? A. No.

Q. All you know is the part you took in putting out the fire? A. Yes.

Q. And after it was over you noticed a burned Jeep? A. Yes.

Q. And then a duffle-bag was burned?

A. Yes.

Q. You don't know what started it, except what somebody told you?

(Deposition of John Kristiensen.)

A. Somebody told me, that is all. And nobody else knows except the soldiers.

Mr. Levinson: That is all.

Redirect Examination

By Mr. Franklin:

Q. Mr. Kristiensen, did you order Lubinski to stow these distress bombs in any particular part of the forepeak? A. No, I did not.

Q. What was the order you gave him?

A. I ordered him to take them down below, and then he took them down into the forepeak or some place to get them off the deck.

Q. Who decided where they were to be placed?

A. It must have been him put them there.

Q. How long would you say those smoke bombs were stowed where they were before the escape of gas, at Attu?

A. How long they had been down there?

Q. Yes.

A. Well, they stowed them down there on the way going up [272] to Alaska, going up to Attu, so they must have been down there for some time.

Q. How many days?

A. They must have been down there a month.

Q. How frequently would Lubinski be down in the forepeak?

A. Oh, I guess mostly every day.

Q. Who was in charge of the forepeak?

A. Well, he is the boatswain. He really is the one in charge. He has the key for it. He and I have a key.

(Deposition of John Kristiensen.)

Q. Who is in charge of policing up the forepeak, keeping it in order?

A. That is the boatswain. He has the gang to do it.

Q. Did Lubinski ever ask you for permission to move the smoke bombs from the forepeak?

A. No.

Mr. Franklin: That is all.

Q. (By Mr. Levinson): You say that is where they were during that month, under your instructions. You saw where those bombs were?

A. Yes, I saw them lying down there. I never took any notice. I never thought anything like that would happen.

Mr. Levinson: That is all.

Q. (By Mr. Franklin): Did you ever have occasion to go aft along the starboard side of the forepeak into the carpenter shop after those smoke bombs were stowed?

A. I walked back there mostly every day.

Q. Did you encounter any difficulty in walking along the starboard side between the hatch and the smoke bombs? [273]

A. No.

Q. Was there sufficient room?

A. Yes. There was about a couple of feet to walk. That ought to be enough.

Q. (By Mr. Levinson): How much light is down there?

A. Oh, the light is pretty good. Sometimes they might go out and they would have to put new globes in, change the globes. There is always a globe burned out. There is two globes there and one in

(Deposition of John Kristiensen.)

the carpenter shop, big ones. There is enough light down there. The same down below. There is lights.

Q. (By Mr. Franklin): Mr. Kristiensen, what kind of weather did the deckload encounter from San Francisco to Alaska?

A. It was not bad. It was pretty good, fairly good weather. There was rain, you know.

Q. Were you shipping any seas over the deck?

A. The spray. Of course it was too high to take real big seas, but it would take spray over.

Q. What effect did that have on the deck cargo before you stowed it down below?

A. Well, it go wet.

Q. That is all. Do you waive the reading and signing of your deposition, Mr. Kristiensen?

A. Yes.

Mr. Franklin: Then that is all. Mr. Levinson, do you waive the reading and signing of his deposition by the witness?

Mr. Levinson: Yes. [274]

(Deposition Concluded.)

Mr. Franklin: We offer the testimony just read in evidence.

The Court: It is received as part of the Respondents' case. We will take a recess at this time.

(Recess)

Mr. Franklin: We will now offer in evidence the deposition of Jorgen I. Seather, taken August 24, 1944.

JORGEN I. SEATHER,

called as a witness on behalf of Respondents, having been duly sworn by the Notary Public, testified on behalf of Respondents by deposition as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, please?

A. Jorgen I. Seather.

Q. Where do you live, Mr. Seather?

A. At 8039 Interlake Avenue, Seattle, Washington.

Q. What is your calling, Mr. Seather?

A. I am a Mate.

Q. You follow the sea?

A. I follow the sea.

Q. What licenses do you hold?

A. I am right now second mate on the "Delazon Smith."

Q. How long have you held a second mate's license? [275]

A. I have a mate's license now. I held a second mate's license for about a year.

Q. You now have a chief mate's license?

A. Yes, sir.

Q. How long have you held a chief mate's license? A. Nine months.

Q. Where have you sailed; what has been the extent of your sea service, in general?

A. On my license?

Q. On your license.

(Deposition of Jorgen I. Seather.)

A. On my license, Alaska mostly—Alaskan waters.

Q. How long have you been going to sea in any capacity? A. Seventeen years.

Q. You were an A.B. for how many years?

A. Say about 12 or 14. I couldn't say exactly.

Q. Was some of that experience in the Merchant Marine? A. Yes, sir.

Q. What nations?

A. The Norwegian Merchant Marine.

Q. Mr. Seather, during the year 1943, what vessel were you on as second mate? Limit it to about June of 1943. A. I was on the Flavel.

Q. Where did you join her?

A. I joined the Flavel in Seattle.

Q. Where did your voyage take you to?

A. We took the Flavel to Bristol Bay.

Q. Where did you go from Bristol Bay?

A. From Bristol Bay to San Francisco, where the Army took her over.

Q. What did you do at San Francisco? What was done with [276] reference to loading the vessel there, and what kind of cargo?

A. She was taken over by the Army Combat, loaded by the Army and sent north to Adak.

Q. Did you have troops aboard the vessel?

A. Yes, we had. I should say about 1200 or 1300.

Q. Did you have any Naval units aboard the vessel?

A. Yes, we had. We had some amphibious units on there.

(Deposition of Jorgen I. Seather.)

Q. How many were in the amphibious units?

A. Approximately fifty.

Q. Where was No. 3 hatch loaded?

A. At San Francisco.

Q. This was approximately the latter part of June, 1943? A. Yes.

Q. Do you now what was loaded in No. 3 hatch?

A. Yes. There was coal—I recall coal and snow jeeps.

Q. Who superintended the loading of No. 3 hatch? A. The Army.

Q. Did the Army supply you with any travelling personnel to handle the discharge of cargo after you left San Francisco?

A. Yes. We had two cargo security officers. One's name was Lt. Hill, and the other one was Lt. Hearst.

Q. Did they accompany the vessel to the Kiska invasion? A. Yes, they did.

Q. At the time you left San Francisco were you supplied with any gas masks?

A. Yes. We were issued regulation Army gas masks.

Q. By whom? A. By the Army. [277]

Q. Would you describe the gas masks, in general?

A. Yes. It is a mask form with goggles, tight fitting around the nose and eyes, and it has a charcoal container to purify the air.

Q. That fits in the mouth?

A. That fits in the mouth.

(Deposition of Jorgen I. Seather.)

Q. What equipment did the Naval Landing have aboard the vessel?

A. Just what was regulation for the landing crafts.

Q. Did they have some landing craft?

A. They had landing craft. We had ten of them.

Q. Where were they stowed?

A. We had six of them stowed forward, under No. 2 general, and forward end aft.

Q. Mr. Seather, prior to reaching Attu, Alaska, on or about July 15, 1943, did you see any smoke distress bombs belonging to these landing craft on the vessel?

A. No, sir; I did not.

Q. What was your watch?

A. Eight to twelve.

Q. That is, eight to twelve in the morning, and eight to twelve in the evening?

A. That is right.

Q. On July 15, 1943, were you on watch about ten o'clock?

A. Yes.

Q. Did you observe anything unusual in the vicinity of the forepeak?

A. Yes.

Q. State what you observed.

A. Well, I came forward amidships and I saw some red [278] fumes, what I thought was smoke, rising from the ventilators in the forepeak.

Q. How you had occasion prior to noticing this smoke to visit the forepeak on that trip?

A. No, I did not.

Q. What did you do?

(Deposition of Jorgen I. Seather.)

A. I went forward. There was a gathering of men up there, up around the forepeak, in the forward part of No. 1 hatch, and I went up there. They had already started springing some hoses. I could tell what it was as soon as I came up. I knew it was a daytime smoke signal.

Q. How did you know that?

A. You can tell by the color of the fumes.

Q. What was the color?

A. They are very reddish.

Q. Had you ever seen a daytime distress signal bomb explode before?

A. Yes, on several occasions.

Q. Then what did you do?

A. I told them to start dragging hoses around, and I ordered someone to get gas masks, and it is my recollection there was two or three brought up there.

Q. Where did you get your gas mask?

A. It was taken out of one of the rooms. I don't know. It was not mine. One of the A.B.'s got it, I don't recall who. I went to the forepeak and made a circuit. I didn't see anything. I couldn't locate.

Q. In making the circuit, would you just describe what you did? [279]

A. Well, I walked in the center of the storeroom aft of the scuttle, and aft of the ladder. There is a hatch opening that leads into a lower level, and I walked around that. I walked back as far as the bulkhead, and we made a circuit and came back

(Deposition of Jorgen I. Seather.)

on the other side, and looked around some, and came back on deck. I couldn't find it.

Q. Was anybody with you at this time, when you made your first tour?

A. Yes. There was two more men down there.

Q. Were they A.B.'s or officers?

A. One A.B.

Q. Do you recall his name?

A. No. I couldn't say who it was. I don't just recall. And the boatswain was down there.

Q. Mr. Lubinski? A. Mr. Lubinski, yes.

Q. How dense was the smoke when you were down there?

A. Well, it was just enough so that I couldn't locate the smoke signals.

Q. Could you see anything on your first tour of inspection?

A. Yes, I could see what was stowed down there, but I just couldn't locate the source of the smoke.

Q. Did you notice what was stored in the starboard side of the vessel? A. I don't recall.

Q. What did you next do?

A. I came back on deck for a breathing spell and stayed on deck for a little while, and went back down, and I made another round over approximately the same route. [280] I still didn't find anything, so I came on deck. While I was on deck this time the smoke signal was brought up.

Q. In making these two rounds of the forepeak, did you encounter any difficulty in walking

(Deposition of Jorgen I. Seather.)

along the starboard side or the port side or the forward or after part of the vessel?

A. There was some manila stowed there, but I didn't have any difficulty getting around.

Q. Was there ample walk-way space?

Mr. Levinson: That is objected to as leading.

Q. Was the space sufficient to enable you to make your rounds without any difficulty?

Mr. Levinson: I objected on the ground that the question was leading.

Mr. Franklin: It calls for a "yes" or "no" answer.

The Court: The objection will be overruled.

A. Yes; I got around.

Mr. Levinson: I move to strike the answer on the same grounds.

Q. Mr. Seather, how did you get down originally to the forepeak from the main deck?

A. I walked down the ladder.

Mr. Franklin: I will ask to have this picture marked for identification as Respondents' Exhibit No. 1.

Mr. Long: Does your Honor wish that same exhibit number to be carried on, where we called it Exhibit No. 1? [281]

The Court: We had Respondents' Exhibit No. 5 identified. Let this be marked as Respondents' Exhibit A-6 for identification.

(Respondents' Exhibits heretofore marked
Respondents' Exhibits Nos. 1, 2 and 3 to the

(Deposition of Jorgen I. Seather.)

deposition of Seather, re-marked for identification Respondents' Exhibits A-6, A-7 and A-8, respectively.)

The Court: Does the same thing refer to Mr. Seather's deposition as at page 10, Respondents' Exhibit No. 1?

Mr. Long: In other words, Respondents' exhibit now marked A-6, is the one referred to in the Seather deposition as Respondents' Exhibit No. 1 for identification. There will be three exhibits in connection with this deposition.

Mr. Franklin: I will resume reading the deposition beginning at line 18, on page 10.

Q. (By Mr. Franklin): I will show you this photograph that has been marked for identification as Respondents' Exhibit No. 1 (A-6) and ask you if you can identify that picture and state what it shows. A. Yes.

Q. What is it, please?

A. It is a photo of the storeroom, the hatch leading down to the lower storeroom. The hawse-pipe up forward, and this ladder leading down. These are bins or lockers.

Q. You are referring to the bins on the left side of the picture?

A. That is correct—on the starboard side.

Q. On the starboard side? [282] A. Yes.

Mr. Levinson: On the left side of the picture?

Mr. Franklin: No; that is the left side over here (indicating).

(Deposition of Jorgen I. Seather.)

Mr. Levinson: From which direction was this picture taken?

The Witness: That is taken from aft, looking forward.

The Court: That particularly shows the bins on the starboard side?

Mr. Franklin: No.

The Court: I do not see any stairway.

Mr. Franklin: May I point it out to the Court?

The Court: I do not see any stairway in the picture.

Mr. Franklin: Right there, if the Court please (showing).

The Court: One would have to indulge a good deal of imagination, but I guess it is a stairway.

Mr. Levinson: It is an iron ladder.

The Court: Some persons might prefer to call it a ladder. Now, the hawse pipe——

Mr. Franklin: Right here, if the Court please (indicating).

The Court: Counsel is referring to a big pipe in the back center of the picture.

Mr. Long: Where the anchor chain goes through, your Honor, from the forecastle head.

The Court: It looks large enough to [283] accommodate such a passage. You may proceed.

Mr. Franklin: I will ask to have this picture marked for identification as Respondents' Exhibit No. 2, which will now be Respondents' Exhibit A-7.

Q. (By Mr Franklin): Handing you what has been marked for identification as Respondents' Ex-

(Deposition of Jorgen I. Seather.)

hibit No. 2 (A-7), I will ask you to state what that shows?

A. That is the starboard side, looking aft.

Q. What is the open compartment in the rear of the view?

A. That is a locker. That was built in the vessel when it came out of the yard.

Mr. Franklin: I will ask to have this photograph marked for identification.

Q. (By Mr. Franklin): I will show you what has been marked for identification as Respondents' Exhibit No. 3 (A-8) and ask you if you can state what that is?

A. That shows the hatch, looking aft, in the same storeroom. You can see the bulkhead there. This is about amidships.

Mr. Levinson: Mr. Franklin, if we may direct your attention to it, that is the exhibit that shows the new shelves put in after the fire.

Mr. Franklin: No; that is Respondents' Exhibit A-7.

Mr. Levinson: Respondents' Exhibit A-7 shows a different series of lockers and shelves on the starboard side, and those were put in after the fire. It is so agreed.

Mr. Long: After the smoke bomb. [284]

Mr. Levinson: They were not in position at the time of the fire.

Mr. Franklin: I think the deposition will so show.

(Deposition of Jorgen I. Seather.)

Mr. Levinson: I am not sure that it does, but that is the fact.

Mr. Franklin: Yes.

Mr. Levinson: The shelves that appear on the starboard side were not there.

Mr. Franklin: Can it be further stipulated, Mr. Levinson, that those three pictorial exhibits, marked Respondents' Exhibits A-6, A-7 and A-8, were taken of the forepeak of the SS "Flavel" on the dates indicated on the backs, which is, I believe, August 15, 1944?

Mr. Levinson: A year after the occurrence.

Mr. Franklin: Yes.

Q. What is the hatch in the center, where does that lead?

A. It leads into the lower storeroom. The storeroom is on two levels.

Q. In making your two tours of inspection, did you completely——

A. (Interposing): Yes, I circled this.

Mr. Levinson: That is objected to as leading.

Q. In which direction did you proceed?

A. I came aft on the port side, walked aft and came over to the starboard side. I looked around the ladders here and came up.

Q. How long after the smoke was discovered before the [285] smoke bomb was brought on deck, approximately?

A. How long from the time the smoke was discovered until the smoke signal was brought on deck?

Q. Yes; if you remember.

(Deposition of Jorgen I. Seather.)

A. I would say fifteen minutes

Q. Did you see the bomb after it was brought on deck? A. Yes, sir.

Q. Would you describe its appearance?

A. Yes.

Q. First, let me ask you, do you know who brought it on deck?

A. I don't know just who brought it on deck. I couldn't say. It was brought on deck. It was just there. It was there for anyone to see.

Q. Just describe what it looked like.

A. Well, it was all black, burned out, and the plug was missing. In fact, there was,—oh, I should say four cases of these smoke signals brought on deck at the same time. They were all taken up.

Q. At the time you examined this smoke signal, could you describe its general appearance?

A. Well, it is a cylinder, about the size of a gallon can, approximately, and it has a screw plug in one end. This screw plug was missing.

Q. Then you say that some cases of these smoke bombs were brought out?

A. Yes; I should say four cases of them.

Q. Did you have occasion to examine all the cases, look at them?

A. Yes. One of them was broken open. [286]

Q. What kind of cases were they, as to material?

A. They were containers approximately,—oh, say, eighteen inches—16 to 18 inches square, and they had four of these smoke signals in there, with cardboard divisions in there.

(Deposition of Jorgen I. Seather.)

Q. You have testified that in one of those cases the cardboard covering of the case had been removed?

The Court: I think we will take an adjournment at this time.

Mr. Levinson: One of our proposed exhibits, Libelant's Exhibit No. 2, has been identified, but not admitted, and it will not be offered any further. Mr. Lubinski advises me that it is part of the records at the Union Hall, and I would like permission to remove that exhibit that has been marked for identification.

The Court: Is there any objection to withdrawing this exhibit and returning it to counsel?

Mr. Franklin: No, your Honor.

The Court: Then Libelant's Exhibit No. 2 is now withdrawn and returned to counsel who produced it.

(Whereupon, Exhibit heretofore marked Libelant's Exhibit No. 2, is withdrawn and returned to custody of Proctor for Libelant.)

Are there any details you gentlemen wish to speak of? If not, the court will be adjourned until tomorrow at ten o'clock in the [287] forenoon.

(Whereupon, an adjournment was taken until January 11, 1945, at the hour of 10:00 o'clock a.m.) [288]

January 11, 1945, 10:00 O'clock A.M.

The Court: You may resume the trial.

Mr. Levinson: Your Honor, I would like to inform you that I have a witness here, Mr. Robert T. Kenney, who was a member of the crew of this vessel. We pulled him off a ship that got in early this morning, and we arranged for his leave until noon. If your Honor wishes to finish this deposition rather than calling the witness now, I would ask leave to call him before he is required to report for duty again. It is a discretionary matter entirely with your Honor, because it is part of my case in chief, but the witness just got in this morning.

The Court: You have already rested your case?

Mr. Levinson: I have rested my case, but I will ask leave to re-open it for this purpose.

The Court: What is your attitude for the Respondents?

Mr. Long: I have no objection, your Honor.

Mr. Levinson: I have in mind that if your Honor would prefer, we might finish reading this deposition. I do not like to interrupt in the middle of the deposition, and he has enough time for us to finish this deposition.

The Court: I was thinking of the convenience of the witness. He doesn't have very much time ashore, and he is tied up all [289] of the time and I think in the interest of his own convenience, the Court ought to hear him now.

Mr. Long: I think this ought to be the last time counsel re-opens his case.

Mr. Levinson: The witness has just arrived.

The Court: He may come forward. The Libelant's case in chief is opened up for the purpose of hearing the testimony of this one witness only. His testimony may now be taken out of order, the deposition which was being read as part of the Respondents' case being interrupted for this purpose.

ROBERT T. KENNEY,

called as a witness on behalf of Libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Br. Mr. Levinson:

Q. Will you state your name, please?

A. My name is Robert T. Kenney, commonly known as "Bud" Kenney.

Q. Are you attached at the present time to a vessel? A. Yes, sir.

Q. And what is the name of that vessel?

A. The Makama. (?)

Q. What position do you occupy on that vessel?

A. Third officer. [290]

Q. When did that vessel get in here?

A. It got in this morning at 3:00 o'clock.

Q. Mr. Kenney, were you a member of the crew of the SS "George Flavel" on a voyage which commenced at San Francisco approximately in June of 1943, and which was subsequently involved in the Kiska invasion? A. Yes, sir.

(Testimony of Robert T. Kenney.)

Q. Where did you join that vessel?

A. In San Francisco.

Q. In what capacity did you join that vessel?

A. Able bodied seaman.

Q. Then you have since been promoted to third officer?

A. Yes, sir.

Q. Mr. Kenney, in joining that vessel, tell the Court how you signed on down there, and how you joined the vessel?

A. First you go to the Hall and get a shipping card, and usually they put the name of the vessels up on the board, like this vessel was the "George Flavel," Alaska Steamship Company.

Q. Does the board indicate the operator of the vessel as well as the name of the boat?

A. Yes, sir.

Q. You have your choice of the jobs that are on the board?

A. Yes, sir.

Q. State whether or not the name of the operator is a factor in determining whether you will take the job or not?

A. Yes, it is. Some chaps do not like to ship with certain companies, for different reasons.

Q. How was the "George Flavel" indicated on the board at the time? [291]

A. Alaska Steamship Company.

Q. Now go ahead. Where did you sign on the "George Flavel"?

A. At San Francisco.

Q. Who did you think was the operator of the vessel at the time you signed on?

(Testimony of Robert T. Kenney.)

Mr. Franklin: That question is objected to.

The Court: The objection is sustained.

Mr. Levinson: I have in mind, your Honor, a specific problem, and frankly that is why I am asking this.

The Court: What is the problem?

Mr. Levinson: It is a question of law. Counsel has sought, and indicated prior to the introduction of evidence, to eliminate the Alaska Steamship Company as a respondent. I have some authorities I was prepared to present to your Honor to the effect that the Alaska Steamship Company, under certain statutes such as this, including the specific Agency Agreement upon which counsel relies, should remain as a respondent in this type of case, and one of the determining factors is what the seaman knew as to his employer, or proposed employer, at the time he joined the vessel, and it is for that reason I am asking this question, to relate to that particular problem, as the question of the employment by the Alaska Steamship Company of the Libelant is one of the issues, because it is denied in the answer.

The Court: Mr Levinson, the reason the Court is sustaining this objection, and possibly not sustaining objections to questions previously in your case propounded to another witness, which you may think were very similar to this question, is that this witness obviously is a very [292] intelligent witness, and I think the question is not proper over objection, considering the intelligence of this witness and

(Testimony of Robert T. Kenney.)

his experience, to let him state his conclusions. He can state the facts. It is upon that basis the court sustains this objection.

Mr. Levinson: I will reframe the question, your Honor.

The Court: Very well.

Q. (Mr. Levinson): Mr. Kenney, will you tell the Court the facts of your employment, how you were employed on the vessel, and the determining factor, what you did?

A. What vessel do you mean?

Q. On the "George Flavel."

A. On the "George Flavel" I shipped as able bodied seaman.

Q. Where did you sign the articles?

A. In San Francisco.

Q. At the time of signing the Articles, was any statement made to you that the operator of the vessel was the War Shipping Administration?

Mr. Franklin: If the Court please, it is obvious that any statement made to this man is immaterial in so far as the Libelant is concerned. The question is, if it is proper—which I do not think it is—what statements, if any, were made to the Libelant when he signed the Articles. What statements were made to other men is obviously not binding, and are immaterial.

Mr. Levinson: I will meet that objection by asking a preliminary question, if I may.

Q. (Mr. Levinson): Did all the men sign on together?

(Testimony of Robert T. Kenney.)

A. Yes, sir.

Mr. Franklin: The same objection, your Honor.

The Court: Are you going to show that such statements you asked about in the objective question were addressed to all the men?

Mr. Levinson: That is right, your Honor.

The Court: You may cover that preliminarily.

Q. (Mr. Levinson): At the time the men signed on was Mr. Lubinski there?

A. Yes, sir.

Q. Were you there? A. Yes, sir.

Q. It was in the office of the Shipping Commissioner? A. It was aboard ship, sir.

Q. Was any statement made at that time, in the presence of Lubinski and yourself and the other men, as to the fact that the War Shipping Administration was the operator of that vessel?

A. No, sir.

Q. Do you recall about when the vessel left San Francisco?

A. I remember it left on a Sunday. I can remember that.

Q. Do you remember how many days you were around San Francisco before you left?

A. It has been so long ago, and I haven't thought about this and I would be strictly guessing, but I imagine it was around about three days.

Q. Do you recall the occasion of a fire in the forepeak of the "George Flavel" while the vessel was at Attu, Alaska? A. Yes, sir.

(Testimony of Robert T. Kenney.)

Q. Immediately prior to the fire what were you doing?

A. I think we were working on the purchase, on the gear. [294] We had the block lowered down in the lower hold, and we were overhauling it.

Q. Do you recall who was working on that block at the time?

A. The boatswain, Lubinski, and myself, and three or four other sailors.

Q. That is, the deck crew? A. Yes, sir.

Q. At or about that time do you recall whether or not any person was sent from your crew to obtain any tools?

Mr. Long: I do not think counsel should lead the witness with every question. Let him tell us what he remembers.

The Court: Objection sustained.

Q. What was done at that time in connection with the obtaining of some tools?

A. I think we were trying to get the wire off the block, and we had to send up forward for another wrench, if I remember correctly, and some chap was sent up forward to bring the tools back, which he did.

Q. How did you receive the tools, how were they delivered to you?

A. I believe they let them down on a line, if I remember correctly.

Q. Do you recall a fire that occurred?

A. Yes, sir.

(Testimony of Robert T. Kenney.)

Q. How did you receive notice of that fire?

A. Somebody on deck hollered "Fire in the forepeak."

Q. With relation to the time you received the tools, how much time elapsed, if any, between that time and the cry of "Fire"? [295]

A. Oh, about four or five minutes, I imagine.

Q. What did you do when you received notice of the fire?

A. I immediately went up on deck.

Q. Who went up with you?

A. I remember that I went right behind the boatswain.

Q. When you got to the forepeak what did you see?

A. I saw a lot of orange smoke coming out of the hold.

Q. Do you remember whether the mate was there when you got there?

A. That I don't recall correctly, if he was there or not. I remember we ran up there. Everybody was excited.

Q. During the course of the fire was the mate there? A. Yes, sir.

Q. Do you know just about when he came?

A. Very soon after we got there.

Q. When I refer to the mate, I refer to the first officer. A. Yes, that is correct.

Q. Do you remember his name?

A. Kristiensen, I believe.

(Testimony of Robert T. Kenney.)

Q. Go on in your own words and state what occurred there.

A. I remember we all ran up forward and we saw this orange smoke coming out of the hatch there. We couldn't figure out what it was. We knew there was a magazine down in the hold, and everybody was pretty worried about it, and somebody, I don't remember who, brought these gas masks forward, and if I remember correctly, I think the mate told the boatswain to go below and see what he could find out, which he did, and he was down below and he came back up.

Q. How long was he down there the first time?

A. Oh, I don't imagine he was down over about eight minutes. It was pretty hard to stay down there.

Q. Tell what occurred after that, and what you did.

A. Then he came up and he was gasping for air, so he handed me the gas mask and asked me to go down, so I went down and he immediately came down with me, trying to find out what was down below. We couldn't find anything. We looked around, and they were pouring water in the hold at the time, so we came up again for more air.

Q. How long were you down there?

A. I imagine I was down there about five minutes.

Q. Do you know on how many occasions during that time Mr. Lubinski went down there, or can you give us any idea?

(Testimony of Robert T. Kenney.)

A. I don't recall correctly, but I do remember of him being down there practically every time. He was the one that went down. He was the one that led down.

Q. Were you on deck when he came up?

A. Yes, sir.

Q. Did you observe, or were you able to observe his appearance when he came on deck?

A. Yes, sir.

Q. Were you present when his gas mask was removed? A. Yes, sir.

Q. Describe to the court what you found, what you saw about his appearance when he removed the gas mask.

A. I remember when he came out of the hold he had the gas mask on, and there was a lot of orange powder-like substance all over his face. Then he took the gas mask off and I remember it was under the gas mask, too.

Q. Can you describe this powder, or whatever it was? [297]

A. It was kind of orange in color. I imagine you could say it looked like talcum powder, I guess.

Q. Was it possible to brush it off?

A. I believe so, yes. I believe he did brush it off.

Q. What was your condition with reference to the powder, or this dust?

A. I remember when I came out of the hold, I had a burning in the throat, and my eyes were burning.

(Testimony of Robert T. Kenney.)

Q. What was your condition with reference to the powder, or this dust?

A. It was over my face and under the mask, just like the rest of the chaps.

Q. How long before the fire was out, about?

A. I don't remember correctly, but I imagine perhaps forty-five minutes we were up forward there. I don't remember correctly.

Q. Did any of the other boys go down, if you recall?

A. I believe that one of the officers went down.

Q. Were any of the other members of the crew down there?

A. Yes, I think there was one or more of the sailors—another sailor that went down, if I remember correctly.

Q. Were any of the other members of the crew around at that time?

A. Yes. I believe practically everybody was around at that time.

Q. After the fire did you ever see Lubinski around on the deck and on the ship?

A. After the fire?

Q. Yes.

A. You mean immediately afterwards? [298]

Q. Well, within the next few days.

A. Oh, yes, I saw him every day, talked with him every day.

Q. What was the condition of his eyes following that fire, if you recall?

(Testimony of Robert T. Kenney.)

A. I remember he was troubled with his eyes. He had some trouble with his eyes.

Q. In what way?

A. His eyes were burning.

Q. Was there any complaint made by Lubinski?

A. Yes. I believe he made a complaint to the chief officer.

Q. Was any treatment given him during that time, if you know?

A. She was equipped for troops, and I think we had on board an Army doctor. I think he washed his eyes out, or took care of them.

Q. How did your eyes feel after that?

A. My eyes burned a little bit, and I had a burning in the throat, but that was all.

Q. How long did that last?

A. I remember it lasted for maybe four or five hours and then went away.

Q. How long did your eyes burn?

A. I imagine it lasted perhaps two or three hours afterwards.

Q. Were there any other members of the crew, to your observation, who were affected in their eyes after the fire?

A. This other sailor—I believe his name was “Smokey,” he was complaining about his eyes.

Q. How long did that condition exist?

A. It seems to me he was complaining for quite a while afterwards, running into a couple of weeks, two or three weeks. [299]

(Testimony of Robert T. Kenney.)

Q. Were you on the ship when you had the second fire, at Kiska? A. Yes, sir.

Q. Tell what you know about that. How was it called to your attention?

A. I don't remember a lot about the second fire. I think I was working aft then, and the alarm came for fire, and we ran forward. I believe it was No. 3 hatch. There was a lot of ammunition down there, so we grabbed the fire hose, and I had one fire hose, and I believe I was on the starboard side with a fire hose.

Q. Did you see Lubinski at that time?

A. I saw Lubinski when we went up to the fire. We were working aft, and all ran up there together.

Q. Did you see him in the hold at all?

A. I believe he went in the hold.

Q. Did you see him come out?

A. No; I don't recall.

Q. You do not know anything about him being struck by a hose or anything?

A. No; I don't recall that.

Q. Mr. Kenney, where did you sign off that ship? A. In Seattle.

Q. Do you remember about when that was?

A. I believe it was in September.

Q. What have you done since then, briefly, and where have you been?

Mr. Franklin: That is objected to as immaterial.

The Court: It might show his experience; it might bear [300] upon his understanding. The objection is overruled.

(Testimony of Robert T. Kenney.)

A. Immediately after that I took the train to San Francisco and I went to school over at Alameda for four months, and then I shipped on this ship that I am now on as fourth officer, and I have been on this ship 11 months.

Q. In trying for an officer's job, is it necessary to take a physical examination?

A. Yes. You take a very strong physical examination.

Mr. Franklin: That is objected to, your Honor.

The Court: Objection sustained.

Mr. Levinson: I think it is material as showing——

Mr. Franklin (Interposing): Obviously, this witness cannot testify to the rules and regulations. That is not the best evidence of the rules and regulations in regard to the promotion of officers.

Mr. Levinson: Here is a man who was on the same ship and had an inferior position at the time, and the purpose of the examination is to show that in the normal course of promotion this Libelant would be unable to pass the physical examination that was given his crew-mate for an officer's job.

The Court: The objection is sustained.

Q. Just tell briefly where you have been since you joined the Makama? (?)

A. I shipped on the Makama (?) on March 17, in San Francisco. We made a trip to Australia, to Brisbane and Sidney, and then back to San Francisco, and then we shipped again. I have been out on it ever since then. I think this trip

(Testimony of Robert T. Kenney.)

has been six months on Articles, and we have been in New Guinea and any Island around there that [301] you could name.

Q. Was your ship involved in some of the landings made in some of the islands?

Mr. Long: As a matter of security, I do not think that he should divulge that information.

The Court: Do they take persons with only one eye in that service, the Merchant Marine?

The Witness: I do not believe so, sir.

Q. You say your ship got in here this morning?

A. Yes, sir.

Q. Have you ever seen Lubinski since you left the ship in September of 1943? A. No, sir.

Q. Have you seen him before this morning?

A. No, sir.

Q. Have you ever talked to me before?

A. No, sir.

Mr. Levinson: You may cross examine.

Cross Examination

By Mr. Franklin:

Q. You talked to Mr. Levinson this morning about the case, of course?

A. Oh, yes.

Q. As a matter of fact, you had forgotten all about it, hadn't you, it happening so long ago?

A. Yes, sir.

Q. Do you know when this fire occurred at Attu, the day or the month? A. No; I don't recall.

Q. Do you know whether it happened in the morning or afternoon or evening?

(Testimony of Robert T. Kenney.)

A. I remember it was in the evening.

Q. What time?

A. I imagine it would have been around nine o'clock at night. We were working overtime is how I happen to remember.

Q. You do not remember the name of the individual you say went forward to get some tools?

A. No, I don't remember.

Q. How would you remember that incident after this length of time, Mr. Kenny, that a man went forward to get tools? Isn't that a regular incident in the ship's work?

A. It would be an incident in the ship's work, but as it happened when the fire occurred, after it was over we were wondering who started that fire, and that came up. That is how I happen to remember that incident.

Q. Nobody knew who started the fire, is that it?

A. Nobody knew.

Q. And then in the discussion you sought to place the responsibility on somebody?

A. No. Everybody was asking who was down in that hold. You see, it was a smoke bomb, and they wanted to know who set it off. Somebody set that off. They just don't go off by themselves.

Q. Did you see the distress signal after it was brought up on deck? A. Yes, sir.

Q. Did you see them before?

A. I remember they were down there, but I never paid much attention to them. [303]

(Testimony of Robert T. Kenney.)

Q. They were in carton containers?

A. I believe they were.

Q. Do you know how many were in a carton container? A. No, I do not.

Q. Do you remember the type of top on each of the cans?

A. You know how a mayonnaise jar is——

Q. A screw cap?

A. ——it looked about that size, and it looked like that type of top.

Q. A cap one would have to screw on?

A. I wouldn't say screw, sir; it might have clipped on.

Q. Do you know?

A. I don't know; no sir.

Q. In any event, it was a cap that had to be removed by some external force to release the contents? A. Yes, sir.

Q. Do you know the name of the individual who went forward to get the tools?

A. No; I don't recall his name, sir.

Q. If you don't recall his name, how do you remember how long he was gone?

A. I happen to remember the incident. I know the chap, but I can't recall his name.

Q. You say he was only gone five minutes?

A. It seemed just about that time.

Q. It might have been more?

A. In other words, it was a short time, is what I mean.

(Testimony of Robert T. Kenney.)

Q. You do not mean it was five minutes; it might have been five or ten or fifteen minutes?

A. I don't imagine it could have been fifteen.

Q. It might have been ten?

A. Perhaps, yes.

Q. If I understood you, you went down with an Army gas mask on?

A. I believe it was an Army gas mask, yes.

Q. A mask that fitted very tightly over the face?

A. Yes, it was a mask that fitted tightly over the face.

Q. And over the head?

A. Over the head, yes.

Q. And has goggles, glass goggles over the aperture for the eyes? A. Yes.

Q. How does one breathe, what is the breathing apparatus?

A. It has a kind of a flutter valve at the bottom, and when you exhale it comes out there.

Q. That was the regulation type of Army gas mask that was given to all the sailors on the vessel?

A. Yes, I believe so.

Q. They were issued when you left San Francisco? A. Yes.

Q. And of course this gas mask when it was adjusted covered the entire face?

A. Yes, when it was adjusted.

Q. If I understood you, when you came up after the exposure to the smoke, you had some powdery substance which was caked over the mask?

(Testimony of Robert T. Kenney.)

A. Yes.

Q. In other words, the mask served as complete protection to the face itself?

A. Supposedly, yes. [305]

Q. Well, it did, as a matter of fact, didn't it?

A. Yes, sir.

Q. Mr. Kennney, when this fire occurred at Kiska, can you place the date of it?

A. No, I cannot, sir. I haven't thought about this for a year.

Q. Can you tell us the time of the Kiska fire?

A. No, I really can't.

Q. All you remember is that it happened?

A. That is right.

Q. Did you look down into the hatch at any time when the fire was burning, or did your duties require you to work away from the hatch?

A. The first part was right at the edge of the hatch, yes.

Q. I suppose the dense smoke was billowing out of the hatch and around the coaming?

A. It was not that dense.

Q. As a matter of fact, the smoke, of course, obscured the vision of one looking in or out?

A. Yes.

Q. That was No. 3 hatch? A. Yes, sir.

Q. Mr. Kenney, with reference to your employment on this vessel in San Francisco, California, you knew before you signed on this vessel that she was a Liberty vessel? A. Yes, sir.

(Testimony of Robert T. Kenney.)

Q. That information is conveyed to members of the Sailors' Union before they are hired?

A. Yes, sir.

Q. Then you say the name of the agent that operates the [306] vessel, in this case the Alaska Steamship Company, is also given to you?

A. Yes.

Q. So that you and other members of the crew knew when you joined in San Francisco, knew from information given them by the Sailors' Union, that they were going to join a vessel for which the Alaska Steamship Company was the General Agent?

A. Yes, sir.

Q. And you knew, and the other members of the crew knew, that all Liberty vessels are owned and operated by the United States of America, the War Shipping Administration?

A. That I don't know for sure.

Q. You mean that is not a fact?

A. I don't know whether it is a fact or not. Maybe some of these companies own these ships, don't they?

Q. You knew this was a Liberty?

A. Yes.

Q. And this was not one of the regular fleet of the Alaska Steamship Company? A. Yes.

Q. You knew by reason of your sea-going experience that all Liberty vessels are owned and operated by the War Shipping Administration of the United States Government?

Mr. Levinson: I object to counsel's statement.

(Testimony of Robert T. Kenney.)

The Court: The objection is overruled. He can ask the question.

The Witness: What was that question?

(Last question read.)

A. Well, I don't know exactly. I know that the Maritime Commission has something to do with all the ships. [307]

The Court: Is there any common waterfront knowledge as to the status of the Liberty ship operation, as to whether or not they are operated by the War Shipping Administration or by private concerns?

The Witness: Most people, most sailors and sea-going people, take it for granted that the company—I don't believe they have ever thought of it that way. I know the Maritime Commission does have the ship.

The Court: Has there been any discussion in the Union Hall among the men?

The Witness: Not that I recall.

The Court: As to what interest the War Shipping Administration has, and also as to what interest the operating agent has in the ship's commerce and trade?

The Witness: Has there been any?

The Court: Any discussion among the men around the Hall. Did you ever hear any discussion about that?

The Witness: I have never, no. Since I have been going to sea the last few years I do not believe

(Testimony of Robert T. Kenney.)

I have been around the Hall over one day or so, to ship out.

The Court: Has the Union business agent made any statement to them?

The Witness: Perhaps so.

Q. (By Mr. Franklin): Mr. Kenney, you have seen collective bargaining agreements between the various seamen's unions and the War Shipping Administration of the United States?

A. Yes, sir.

Q. You knew, as a matter of fact, when you joined the "Flavel" in San Francisco, California, that your terms of employment were covered by a collective bargaining agreement? [308]

A. Yes, I did.

Q. Entered into between the Sailors' Union of the Pacific and the War Shipping Administration of the United States of America?

A. Yes, sir.

Q. Before you signed the Articles, Mr. Kenney, did you read the Articles?

A. I believe I read the rider on the Articles.

Q. The first page of the Articles sets out the name of the operator and owner of the vessel, doesn't it?

A. Yes, sir.

Q. And isn't it your recollection that these Articles that you signed in San Francisco showed that the United States of America was the owner and operator of that vessel, and that the Alaska Steamship Company was specifically listed in those Articles only as the General Agent?

(Testimony of Robert T. Kenney.)

A. Yes; I believe so.

Mr. Levinson: If your Honor please, I object to the question and ask that the answer be stricken. The Articles themselves are the best evidence.

The Court: The objection is overruled. This is cross examination.

Mr. Franklin: That is all. Thank you.

Redirect Examination

By Mr. Levinson:

Q. Mr. Kenney, who are the working agreements referred to by counsel signed with, as far as the company is concerned?

A. I have never come in contact with working agreements or agreements between the Unions and the ship owners. I am [309] not familiar with them.

Q. Counsel asked you if you had ever seen these working agreements.

A. I believe on the Articles it does say the name of the shipping company, and something about the War Shipping Administration.

Q. In your opinion who is the employer when you go to work on these ships?

Mr. Franklin: That is objected to as calling for a conclusion.

Mr. Levinson: Counsel has opened that up.

The Court: The objection is sustained. You may ask him to state the fact.

Q. State the fact. Who was your employer when you joined that ship?

(Testimony of Robert T. Kenney.)

A. The Alaska Steamship Company.

Mr. Franklin: That is objected to as calling for the conclusion of the witness.

The Court: The objection is sustained. He can state what was said with reference to that, and what papers, if any, he signed, and if he has them with him he can bring them out and have them marked for identification.

Mr. Franklin: I ask that the answer be stricken.

The Court: It may be stricken.

Q. Have you any of your shipping papers in regard to the "Flavel" with you?

A. No, I have not.

Q. Was anything said at the time you signed on the "Flavel" about the War Shipping Administration being your employer, or the employer of the crew? [310]

Mr. Franklin: That is objected to as repetition.

The Court: I think that objection should be sustained, because I believe that question was asked.

Q. How is the name of the Agent or the operator of the ship posted on the board, do you recall?

Mr. Franklin: That has been gone into.

The Court: That objection is overruled.

Q. When you go to join a ship, what does it say on the board?

A. You mean in the Union Hall?

Q. Yes.

A. It usually has the name of the ship and the company.

Q. How does it usually read?

(Testimony of Robert T. Kenney.)

A. Well, it could be like this——

The Court: Do not say “could.”

Q. How was it.

Mr. Long: If he remembers.

A. “George Flavel, Alaska Steam.” That would be just about right.

Mr. Levinson: That is all.

Mr. Franklin: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Long: If the Court please, we were reading the deposition of Jorgen I. Seather, a witness on behalf of Respondents, continuing at page 14, line 11. May I ask if counsel has rested his case?

Mr. Levinson: Yes, I have rested.

Mr. Long: We can understand now that your case is rested? [311]

Mr. Levinson: Yes.

The Court: That is what the Court understands. You may proceed with the reading of the deposition of Mr. Seather.

JORGEN I. SEATHER,

called as a witness on behalf of Respondents, testified further by deposition as follows:

Direct Examination—(Reading Continued)

By Mr. Franklin:

Q. Just describe the appearance of the cardboard case where you say one was missing.

(Deposition of Jorgen I. Seather.)

A. One corner of it was broken open, and this one smoke signal was out or missing.

Q. Do you know who had been working down in the forepeak immediately before the smoke was discovered issuing from the forepeak?

A. Yes. Some of the amphibious men had been working in the carpenter shop.

Q. Doing what? A. Repairing.

Mr. Levinson: How do you know? Were you down there?

The Witness: I know he had permission.

Mr. Levinson: But you were not down there. You didn't see it.

The Witness: No, sir; I wasn't down there, but the mate left orders it was all right for those men to work down in the forepeak, not to stop them when I came on watch.

Q. After the smoke, did you observe whether the amphibious units continued working in the forepeak or not? [312]

A. I beg your pardon?

Q. After the fire, what happened to the amphibious unit? A. I couldn't say as to that.

Q. What officers went down below to assist you, or to assist in controlling the smoke?

A. Well, the Ensign, Mr. Kidd. He was the officer of that amphibious force, commanding officer.

Q. Did any of the ship officers go down?

A. Not to my knowledge. Mr. Kristiansen was around there, but I couldn't say whether he went down or not. I didn't see him.

(Deposition of Jorgen I. Seather.)

Q. Mr. Seather, how long do you figure that you were exposed to the smoke from that distress bomb?

A. Oh, on each occasion, I should say five minutes.

Q. Did the smoke irritate your eyes?

A. No, sir.

Q. Did any of the other men or officers make any complaint to you that the smoke had irritated their eyes?

A. No, sir.

Q. Did Mr. Lubinski, the boatswain, at any time complain to you that his eyes had become irritated from exposure to this smoke?

A. No, sir.

Q. Did you see Mr. Lubinski frequently at the Attu smoke incident?

A. Yes; I saw him every day.

Q. He was on your morning watch?

A. No. He was on the day watch, but I saw him around the deck.

Q. What were his hours? [313]

A. Eight in the morning until five o'clock in the afternoon.

Q. And your morning watch was what?

A. From eight until twelve.

Q. So you were on the same watch, were you?

A. Yes; that is correct.

Q. Mr. Seather, could you approximate the time that you discovered the smoke escaping from the distress bomb in the forepeak on the evening of July 15, 1943?

(Deposition of Jorgen I. Seather.)

Mr. Levinson: Evening or morning?

Mr. Franklin: Evening.

The Witness: Evening.

Q. (By Mr. Franklin): What time, approximately?

A. What time of the evening?

Q. Yes, sir.

A. Approximately ten o'clock.

Q. Mr. Seather, after leaving Attu, on July 15, 1943, did you, or the "Flavel" arrive at the Kiska Beachhead on the morning of the invasion?

A. Did it arrive in there?

Q. Yes. A. Yes, sir.

Q. And that was approximately when?

A. Oh, approximately August 15.

Q. What time did the vessel reach Kiska? Was it in the early morning?

A. In the early morning.

Q. What time did you go on watch that morning?

A. From eight until twelve. Pardon me—I will take that back,—we were standing six and six then, the third mate and I were, so I was on from six o'clock in the morning [314] until 12 o'clock noon, and six o'clock in the evening, etc.

Q. During your watch on the morning of the Kiska invasion, what happened to the troops aboard the vessel?

A. Well, some of them disembarked. The biggest part of them. There was still some left on board.

(Deposition of Jorgen I. Seather.)

Q. What happened to the amphibious unit?

A. The amphibious unit had left the ship. They were gone most of the time. All the barges were off.

Q. The amphibious unit was doing what in reference to the ship?

A. They were shuttling men, ammunition and cargo, from ship to shore.

Q. How many hatches were open the morning of the Kiska invasion?

A. Two, to my knowledge,—No. 3 and No. 5.

Q. Who was in charge of the discharging from those hatches? A. Lt. Hill.

Q. What character of cargo was in No. 5 hatch?

A. Ammunition and shells.

Q. Was your attention directed to any unusual event occurring on that morning in No. 3 hatch?

A. Yes.

Q. Will you state approximately what time, and what it was?

A. Somewhere between 900 and 1,000 in the morning, I should say.

Q. What was the unusual occurrence?

A. Well, we had the fire that morning. I was in the chart room at the time, or making some entry in the log and I thought I heard someone say "fire," so I went up [315] on the flying bridge, and there were several men up there, among others Lt. Morrow, or Ensign Morrow.

Q. Then what did you do with reference to fighting the fire?

(Deposition of Jorgen I. Seather.)

A. They said we had a fire, and I said, "Turn in a general alarm," so he pulled the switch over. I stayed long enough to watch him pull the switch.

I went down below, by the Captain's quarters, knocked on his door, stuck my head in, and I said, "We have a fire in No. 3, Captain," and he came on deck. I just went on right down below, down to No. 3 hatch. Lt. Hill was there stringing the water hose, or the fire hose. There was men gathering then. I went up in my quarters and got my gas mask, and by the time I got back there, there were several hoses, and they were already playing water down in the hold.

Q. Did you go out in the hold, then?

A. Yes, I went out in the hold then.

Q. What was the condition of the hold with reference to being filled with smoke?

A. Well, the smoke was somewhat dense, and there was quite a lot of water going in there.

Q. How long did you remain down in the No. 3 hold?

A. I was there until the fire was out.

Q. How long a period of time would you estimate? A. Oh, I should say half an hour.

Q. And during that time, who else did you see down in No. 3 hold, down in the lower hold?

A. Well, there was myself, Gil Erickson, the third mate; Benz; and Kerle, an A.B.; and I saw Mr. Kristiensen in the 'tween decks. [316]

Q. Did you see the boatswain, Mr. Lubinski, down in No. 3 at any time?

(Deposition of Jorgen I. Seather.)

A. No, sir; I did not see him.

Q. Mr. Seather, did you locate the fire?

A. No, sir; I did not locate the fire. We saw it. We knew it was there, and we played the hoses on it, and we knew the general direction, where it was.

Q. Where was the general direction?

A. It was in the after part on the port side, in the wing, you might say.

Q. In the wing of the lower deck of the hold?

A. Of the lower hold.

Q. After the fire was put out, what did you do?

A. I went to my room, changed clothes, and went back down there to determine the extent of the damage, as I had to make a log entry on it.

Q. Did you make a log entry of it?

A. Yes, sir; I did.

Q. What did you find on examination as to what had been burning?

A. Well, there was a snow jeep on fire, was the only thing damaged, that had been burned, I should say. Everything that could burn on it was burned on it.

Q. Was there anything else besides that? Was there evidence of anything else having burned besides the snow jeep?

A. No, sir—just anything that was lashed on the snow jeep. There was equipment belonging to the men, personal equipment.

Q. Do you know who the snow jeep belonged to, that is, whose property it was? [317]

(Deposition of Jorgen I. Seather.)

A. The United States Army.

Q. While you were making your inspection, did you have occasion to talk to any of the soldiers who were in that vicinity?

A. Yes. There was two men down in the hold when I came back down there, and they admitted—

Mr. Levinson: Your Honor will note that I made an objection on the ground that it is hearsay.

Mr. Franklin: I think it is proper for two reasons.

The Court: Is this cross examination or direct?

Mr. Franklin: This is direct examination, and I am asking the third officer if as a part of his official investigation, in connection with making an official log entry, he interviewed certain soldiers to ask what caused the fire. You cannot introduce the log entry for security reasons.

Mr. Levinson: That violates the rule, then.

Mr. Franklin: It is admissible for two reasons. It is primarily admissible because it is part of the *res gestae*, if nothing else, because the time element is so brief after this occurred. Secondly, it is obviously proper because it is a fact, an investigation required by law of all officers in the case of fire. [318]

Mr. Levinson: It is apparent this occurred about half an hour after the fire. The hearsay rule, of course, permits exceptions, but they must be spontaneous and not the result of any consideration. The time element is therefore important. In some cases a five-minute interval may be too long

(Deposition of Jorgen I. Seather.)

and would take it out of the *res gestae* rule, and in other cases it may take twenty minutes. But here we have an investigation made after the excitement is over, and the very reason for the rule is that a person would be inclined to tell the truth in excitement. Here it is a deliberate investigation, and certainly the *res gestae* rule does not apply. I submit the offer is in error.

The Court: May I see what each one has said in this deposition, and then you may proceed, Mr. Long.

Mr. Long: I was not present at the taking of the deposition, and I am little more than a spectator in this case, but it seems to me, your Honor, this matter being a case in Admiralty, the Court is permitted to hear and weigh, as the Court may see fit, pure hearsay, as far as that is concerned.

Here is a situation, it seems to me, where an officer not in connection with this man's lawsuit, but in connection with the [319] security of a ship full of ammunition, made an investigation to determine what the cause was, and he has testified as to what he found at that time. *Res gestae* may extend, as counsel says, from five minutes to several hours, by our own Supreme Court decision. It seems to me under all of the circumstances this is a situation where the witness would learn the truth from soldiers and officers of the United States Army, who have no interest in this lawsuit, certainly, or any other lawsuit. We cannot produce the log book entry.

(Deposition of Jorgen I. Seather.)

The Court: Where is the statement, if any, on that admission?

Mr. Franklin: Page 23, your Honor, lines 7 to 11, inclusive.

Mr. Levinson: May I respond?

The Court: You may respond.

Mr. Levinson: The only thing I would like to add is that the facts offered here are in support of the truth of certain statements made by the persons making the statements, that is, two soldiers, as evidence of facts which they relate. Standing by themselves, of course, they are hearsay, because they are not made under oath and there is no opportunity to cross examine them.

Counsel is seeking to bring them in on the basis of an exception to the hearsay rule, [320] that is, the *res gestae* rule, and the spontaneity which permits *res gestae* statements to be introduced is certainly gone from this case, because here is an investigation made after it has quieted down.

And the reference counsel made to the rule in Admiralty Courts that the Court may admit hearsay, certainly there is a great deal of latitude allowed, but when the hearsay appears in the form of a deposition, where the court does not have the opportunity to see the witness, and we do not have the opportunity to examine further on the point, certainly that situation would not permit hearsay in a deposition, where the court cannot even see the man, which may be a factor in determining whether it should go into the record.

(Deposition of Jorgen I. Seather.)

Mr. Long: Aren't we wasting time? Counsel, are you making any issue of the fact that the fire was caused by a jeep backfiring?

Mr. Levinson: You have to prove how it was caused, and this is not the proof.

The Court: The Court is of the opinion that the statement is not a part of the *res gestae*, and that it is hearsay, and that the objection to it should be sustained, and it is.

Mr. Long: We then wish to make an offer of proof, your Honor.

The Court: You may do that. [321]

Mr. Franklin: If the Court please, the Respondents offer to prove that if asked the following question: "While you were making your inspection, did you have occasion to talk to any of the soldiers who were in that vicinity?"—while the witness was making an official investigation to ascertain the cause of the fire—the witness would respond as follows: "As I said, right down in the hold there were two soldiers standing around that jeep. I asked 'What are you doing here?' and all they said, 'We were trying to start this up and get it out under the gear, and it back-fired and caught fire on us'."

That answer appears from lines 7 to 11, inclusive, on page 23 of the deposition of the witness Jorgen I. Seather.

Mr. Levinson: I object to the offer of proof, your Honor.

(Deposition of Jorgen I. Seather.)

The Court: The objection is sustained for the reasons previously stated by the Court.

Mr. Long: Your Honor will allow an exception?

The Court: Exception allowed. Does that matter end about the middle of page 23?

Mr. Franklin: Yes, your Honor.

The Court: You may resume the reading of the deposition there.

Q. What happened to the jeep after the fire was extinguished, [322] that you know of?

A. Well, it was taken out and taken ashore.

Q. During the period of time that you were down below fighting the No. 3 fire, did you experience any irritation to your eyes from the smoke?

A. No, sir.

Q. Did any of the other men you have mentioned who were down there complain to you that their eyes were irritated from the effects of the smoke?

A. No, sir.

Q. Did they all wear gas masks?

A. Yes, sir.

Q. What type of smoke was it that you experienced? Was it just ordinary smoke?

Mr. Levinson: The question is objected to as leading.

Q. What color was it?

A. Well, the same color as any rubbish smoke.

Q. When was it with reference to the fire at Kiska that you first noticed anything wrong with Mr. Lubinski's eyes?

(Deposition of Jorgen I. Seather.)

A. Well, I never noticed it. The first time I knew of anything wrong with Lubinski's eyes was when he went to a doctor at Kiska.

Q. You mean at Adak?

A. I mean at Adak. It was some time later.

Q. Can you tell us how many days or weeks, if you remember?

A. Well, we laid out there seventeen days. I should say three weeks, approximately.

Q. Did you subsequently make a log entry of the results of your investigation? [323]

A. Yes, sir. It is in the log. The log will show that.

Mr. Franklin: That is all.

Cross Examination

By Mr. Levinson:

Q. Mr. Seather, as one of the officers on the ship, it is your duty, is it not, to exercise general supervision during your watch, at times when you are on duty, for the protection of the ship, the cargo, and the personnel?

A. That is correct.

Q. And that duty is to be performed even though there are some military or naval officers on the ship?

A. To some extent, yes.

Q. Even though the cargo may be loaded under the direction of the Army or Naval officers, you still have some supervisory duty in connection with the safety of such as distinguished from the place of stowage, and the availability for the voyage intended?

(Deposition of Jorgen I. Seather.)

A. Well, yes and no. I do not know what rights we exercise. It is very hard to determine, very hard to determine what rights we exercise.

Q. It is your job, is it, as near as you can, to see that this stowage, in a general way, is safe for both the ship and the crew?

A. That is correct; yes, sir.

Q. You know nothing, do you, about why the smoke bombs were stowed in the forepeak? Did you know the reason why they were stowed there? [324]

A. I didn't know any were stowed in the forepeak. That is out of my jurisdiction.

Q. As a matter of fact, the forepeak is supposed to have only the boatswains supplies and various supplies in connection with the ship?—normally that is correct, isn't it? You did not carry cargo there?

A. That is correct.

Q. Can you tell us whether or not they were stowed in the forepeak because of the absence of sufficient tarps to properly protect them and stow them on deck?

A. No; I cannot tell you anything about that. I do not know about the stowage.

Q. When you were on watch and you noticed the fire on July 15, and the smoke coming out, who sent Lubinski down below?

A. No one was ordered below, to my knowledge. I was in charge, and I most certainly ordered no one to go. I went down below myself, and everything was well cared for.

(Deposition of Jorgen I. Seather.)

Q. When you got down there Mr. Lubinski was down there, wasn't he?

A. Lubinski was down there, I recall that.

Q. He was down there for the purpose of ascertaining the cause of the fire?

A. That is correct.

Q. And in the performance of his duty, as any good sailor should do, he did his best to protect the ship?

A. That is right.

Q. How long did he say down in there?

A. I couldn't say.

Q. He was down there while you went above, wasn't he? [325]

A. Well, I cannot exactly say as to when he was down or when he came up. I recall I was down there, and I recall helping him on with the mask.

Q. That was on deck?

A. On deck, yes.

Q. He went down ahead of you?

A. No. I was the first man down.

Q. He came down behind you?

A. He must have come down behind me, and he came back out, oh, approximately a minute or so after I did. I couldn't exactly say.

Q. And then he went down again?

A. That I couldn't say. I recall he was in there.

Q. You do not know who actually brought the smoke bomb out, do you?

A. No; I do not. I didn't exactly see that.

Q. If Mr. Lubinski brought it up you only know

(Deposition of Jorgen I. Seather.)

what some of the men told you about that?

A. I don't know who brought it up.

Q. For the safety of the ship, it was ultimately necessary to find the cause of the fire, wasn't it?

You couldn't let it go on indefinitely? I mean from the condition at the time the smoke was coming out of there?

A. I knew what was burning there. As far as the safety of the ship was concerned, the safety of the ship was not imperiled at all by that smoke bomb. It would just burn out, and that would be all there was to it.

Q. Was there any danger of it destroying something else down below? [326]

A. No. I do not believe it was causing sufficient heat to set anything afire.

Q. Did you have hoses down below to put it out?

A. Yes, there was hoses down below, because we knew it was a smoke signal. It couldn't be anything else.

Q. How long were the hoses down there?

A. I couldn't say. A couple of minutes.

Q. There was a lot of them there?

A. Yes; there was some.

Q. Wasn't there a lot of things floating down below in that forepeak?

A. No, there was nothing floating.

Q. How long were you down there yourself? Did you just take that one turn around that you described when you were identifying the picture?

A. Say five minutes.

(Deposition of Jorgen I. Seather.)

Q. How thick was the smoke down there?

A. It was pretty thick. It was dense.

Q. How did you know who was down there with you?

A. Well, I know who was down there, because I saw them take their masks out.

Q. When?

A. When they came back on deck.

Q. You were not on deck when the smoke bomb was brought up and still burning?

A. I was not on deck then.

Q. Who brought it up?

A. I don't know. I couldn't exactly say. If I did see it I have forgotten it.

Q. You do not remember whether that was Lubinski or not? [327]

A. No; I couldn't say. Perhaps it was Lubinski. I don't know.

Q. Were you standing close enough to him to see who it was?

A. I didn't see it brought up. There were several cases brought up, and among those cases was the one broken open, and that one smoke bomb was missing out of there. That was lying on the deck. It was still warm from the chemicals. There were several men engaged in that deal, anyway. There was one at the top of the ladder, one probably half-way up the steps, and one at the top.

Q. Who was the one that passed up the bomb that was burning?

(Deposition of Jorgen I. Seather.)

Mr. Franklin: I think he said he doesn't know.

A. I don't know. My back was perhaps turned, and I didn't see it.

Q. How dense was the smoke the second time you went down there?

A. Somewhat the same. It had cleared somewhat I believe.

Q. Was the water still going on there the second time you were down? A. No, sir.

Q. How many times had you been down in the forepeak prior to the time of this fire?

A. Prior to the time?

Q. Yes.

A. Oh, I couldn't say. Many, many times. I was standby mate on that ship and I took her out of port in Seattle, and was standby mate on her at Todd's, and I was down in there probably half a dozen times a day.

Q. This photograph which has been marked Respondent's Exhibit No. 2 for identification, which is looking aft, [328] shows the locker on the starboard side, is that right?

A. That is correct.

Q. That is all ship's gear which appears to be in those lockers? A. Yes.

Q. What is on the port side, a similar arrangement?

A. A somewhat similar arrangement, yes. We have these two bins in here. This here seems to be extra. I don't know what that was for. It was put in later.

(Deposition of Jorgen I. Seather.)

Q. That did not exist at the time you were on the ship?

A. Of course, the space existed, but I don't recall what equipment was stowed in there.

Q. That is all ship gear that appears in this photograph? A. That is right.

Q. Which indicates the purpose of the locker?

A. That is right.

Q. And you would not stow smoke bombs in there without crowding that, if that is the normal amount of ship gear?

Mr. Franklin: That is objected to. There is no showing that that was the amount of gear that was present at the time the bombs were stowed.

Mr. Franklin: If the Coure please, you will probably remember that yesterday when we were discussing these pictures, I stated the deposition would show that there had been some changes made, and they were introduced for general illustrative purposes, and did not purport to represent accurately the conditions existing as of July 15, 1943, at the time the smoke bomb escaped at Attu, [329] Alaska. This question is objected to because there is no showing that the amount of gear shown in these pictures, taken a year later, is the same amount present at the time the bombs were stowed.

Mr. Levinson: It is cross examination.

Mr. Long: I do not think the witness ever answered the question.

Mr. Franklin: Yes. He said that would be a sufficient space.

(Deposition of Jorgen I. Seather.)

The Court: Where?

Mr. Franklin: At page 32, line 5.

The Court: Will you read the question in its last form?

Mr. Long: Line 12, page 31: "And you would not stow smoke bombs in there without crowding that, if that is the normal amount of ship gear?"

The Court: I have some doubt whether or not the answer on line 5, page 32, is responsive to the question beginning on line 12, page 31, but you may proceed.

Mr. Long: I think the answer appears on line 3, page 32, the first answer, which is in the form of a question by the witness—"In under there?"

The Court: You may continue reading the deposition.

A. That would be sufficient space.

Q. You still think there would be sufficient space for a [330] smoke bomb? A. Yes.

Q. How big are those cases that the smoke bombs come in?

A. Oh, they stand about a foot high—I would say a foot high, and about sixteen inches square.

Q. And there were at least four that you know of?

A. I should say there was four of them, yes.

Q. Do you know if there were any more below?

A. No, sir; I do not.

Q. You do not know how many were down there as a matter of fact?

(Deposition of Jorgen I. Seather.)

A. I can recall some of them that were on deck. I should say four. That is the best I can do.

Q. You observed the particular smoke bomb that apparently caused the trouble after it was placed on the deck? A. Yes.

Q. Did you pick it up and look at it?

A. Yes, sir.

Q. What had happened to the cap?

A. Well, there just wasn't any cap.

Q. Did you ever see the cap around there?

A. No, sir.

Q. It has a screw cap, hasn't it?

A. That is correct.

Q. And if it is not put in tightly a jar would knock it out, wouldn't it?

A. No; a jar would not knock it out. It would have to be loosened, and it is a screw cap.

Q. It depends on how tightly it was placed in the opening?

A. Well, they are all supposed to be safe, and there are [331] several, to my knowledge, when they come aboard—we have several cases on board the ship right now. It is ship's gear regulation equipment.

The Court: You mean the cases of smoke bombs?—is that what he means in that answer?

Mr. Franklin: Yes, sir.

The Court: Mr. Levinson, do you agree that is what he means?

Mr. Levinson: I have an objection there, your

(Deposition of Jorgen I. Seather.)

Honor, which I am standing on. I only asked the question as to how tightly the lid was on, and he goes into the question of present equipment on the ship.

The Court: Do you think the answer is responsive, Mr. Long?—all of it?

Mr. Long: I would not pretend to segregate what is not responsive. The question was asked in an argumentative form, "It depends on how tightly it was placed in the opening?" and the witness testified it was screwed on, and the witness is trying not to be misled. I suppose he goes ahead to explain to counsel.

The Court: The words beginning with "and there" in line 11, and continuing to the end of the answer are stricken on the Libelant's motion. The words "Well, they are all supposed to be safe" will remain in the record.

Mr. Long: Frankly, I do not think that is responsive. [332]

The Court: Well, I am sorry, but I will not strike that because I do not think it should be stricken.

Mr. Long: Your Honor will allow an exception?

The Court: Exception allowed. If you wish to request that this be considered later I will reconsider the court's ruling.

Mr. Long: I am not chief counsel in this case, your Honor. If Mr. Franklin wishes to, he may.

The Court: Proceed.

(Deposition of Jorgen I. Seather.)

Q. (By Mr. Levinson): The duties of the boat-swain and the members of the crew with relation to ship's gear require them to go into that locker very frequently, do they not? A. Yes, sir.

Q. When you were down there at the time of the fire, what kind of light was around there?

A. There were the regular overhead lights.

Q. Were they on? A. Yes, sir.

Q. Could you see them through the smoke?

A. Yes.

Q. You were not present when these pictures were taken, were you? A. No, I was not.

Q. You do not remember whether this might have been the Flavel or any other Liberty ship?

A. All I can tell is that it is the forepeak of one Liberty [333] ship.

Q. It is the forepeak of a Liberty ship?

A. Yes.

Q. You are not trying to tell us that this picture in any way represents the condition of the forepeak at the time of the fire, are you? I mean with referenec to the way the floor is all cleaned up, and all that?

A. Well, I do not recall exactly the condition of the floor. I just walked over it, was all, and looked for the smoke signals.

Q. Did you have to feel your way around there looking for the smoke signals?

A. Well, yes, and no. I walked around there. I made a complete circuit there, and I couldn't see where the smoke was, so I came back on deck.

(Deposition of Jorgen I. Seather.)

Q. You mean you couldn't see where it was coming from?

A. No; I couldn't see where it was coming from.

Q. Was the smoke thick enough so that you could see the deck or too thick to see the deck, rather, as you walked around there?

A. No; it was not. It was not that thick.

Q. Couldn't you then ascertain where the smoke was coming from?

A. Well, I walked around there and looked for it. I just couldn't tell where it was coming from.

Q. Other than what the mate told you at the time you relieved him on the watch, you didn't know who was in the forepeak, did you?

A. I just knew it as "say-so", that the amphibious force had permission to work down there.

Q. You didn't know whether they were in fact working down there, did you?

A. I had not seen them down there, no. I hadn't seen them working there.

Q. You didn't know whether, during the time you were on watch, it was necessary for members of the ship crew to go into the forepeak?

A. Perhaps it was necessary.

Q. It is a very frequent occasion on your watch, or any watch, for that matter, isn't it?

A. To go into the forepeak?

Q. Yes.

A. Yes. We go into the forepeak; we take out gear and whatever is necessary.

(Deposition of Jorgen I. Seather.)

Q. You knew Mr. Lubinski?

A. I knew Mr. Lubinski; I knew him, yes.

Q. Did he seem to be a man that knew his business?

A. I refuse to answer that,—can I refuse to answer it?

Q. If your opinion is that he did not, you can so state.

A. I will say he was a sailor.

Q. Was he competent?

A. Yes; I would say so.

Q. Did he seem to perform his duties during the voyage? A. Yes.

Q. During such time as he was on the ship?

A. Yes.

Q. Now, on this August 15th fire, who sent Mr. Lubinski down, if he was down, if you know—at the fire at Kiska, in the No. 3 hold?

A. I don't know that he was sent down at all.

Q. Did you see him down there at all?

A. No; I cannot say I saw him at all.

Q. Did you go clear down to the hold, or did you stay on the 'tween deck?

A. I was down in the hold.

Q. You found it necessary to take a gas mask down with you, didn't you?

A. I had one on, yes, for a protection.

Mr. Franklin: Pardon me—did you complete your answer?—I did not hear it—did you complete your answer before Mr. Levinson interrupted?

(Deposition of Jorgen I. Seather.)

Read the answer. (Last answer read). I did not understand the last few words.

Q. (By Mr. Levinson): How many hoses were going when you went down there in No. 3 hold at the time of the fire? A. How many hoses?

Q. Yes.

A. Well, there were several hoses in there—five or six.

Q. Do you know who was manning those hoses?

A. No; I do not know.

Q. They were being manned up on deck?

A. They were being manned up on deck.

Q. In fact, some of them were manned by some of the steward's department, some of the colored stewards?

A. Well, the entire ship's personnel; yes, sir.

Q. You also had some hoses over the side from a destroyer that came alongside, didn't you?

A. Yes, sir.

Q. And for awhile, with the knowledge that there were ammunitions in the hold, it was pretty exciting—you [336] didn't know what was going to happen?

A. Well, I was down below. I had the hose down below. I didn't know much about what was going on on deck.

Q. In the event that a man is injured, to whom does he complain with reference to any injury—who is he supposed to complain to?

A. He will tell the chief officer.

(Deposition of Jorgen I. Seather.)

Q. That is not your job; your job as second officer was not to receive complaints, was it?

A. No, sir.

Mr. Levinson: That is all.

Redirect Examination

By Mr. Franklin:

Q. Mr. Seather, you are at present a member of the crew of the Delazon Smith—you are at present second officer on the Delazon Smith, are you?

A. Yes, sir.

Q. And you are leaving at some unknown date for some undisclosed destination in the near future?

A. Yes, sir.

Q. You do not know whether you will be here at Seattle to testify in person in the event of the trying of this case?

A. No, sir.

Q. You do not know whether you will be here?

A. No.

Q. And you waive the reading and signing of your deposition in this case?

A. Yes, sir.

Mr. Franklin: Thank you, Mr. Seather. [337]

Mr. Levinson: We will waive reading and signature.

(Deposition concluded)

Mr. Franklin: If the Court please, the Respondents offer the deposition of Jorgen I. Seather in evidence, and we also offer the photographs.

The Court: They are marked Respondents' Exhibits A-6, A-7 and A-8. The deposition of Jorgen I. Seather is now received as a part of the Re-

spondents' case, and each of those Respondents' exhibits, A-6, A-7 and A-8 are now admitted in evidence.

(Photographs received in evidence as Respondents' Exhibits A-6, A-7 and A-8.)

(Recess)

Mr. Long: The next deposition, if your Honor please, is the deposition of Raymond L. Frick, taken on behalf of Respondents in San Francisco, California, on October 26, 1944. Mr. Edward R. Kay appeared for us as proctor for respondents, and Mr. Albert Michelson represented Mr. Levinson as proctor for Libelant. I think the first question is at line 19, on page 2.

The Court: You may read the deposition.

RAYMOND L. FRICK,

called as a witness on behalf of Respondents, having been duly sworn by the Notary Public, testified on behalf of Respondents by deposition as follows:

Examination by Mr. Kay:

Q. (Mr. Kay): Will you state your full name and address, Mr. Frick?

Mr. Michelson: The same stipulation goes to all [338] this?

Mr. Kay: Yes.

A. Raymond L. Frick. Do you want the office address?

Q. Yes.

(Deposition of Raymond L. Frick.)

A. 233 Sansome Street, San Francisco.

Q. And you are an attorney-at-law?

A. I am.

Q. And associated with John H. Black and his staff?

A. I am.

Q. At this address?

A. Yes.

Q. Did you have occasion to discuss the claim being presented by the libelant, Walter Lubinski, with that gentleman?

A. Yes.

Q. And about when was that?

A. Oh, I think it was—the first time he came to the office was I believe approximately a year ago. I am not sure of that time, of course.

Q. I will show you here what purports to be a three-page statement, typewritten statement, of Walter C. Lubinski, bearing what purports to be his signature on each page, and witnessed by Shirley K. Oldroyd, under date of November 13th, 1943.

Mr. Michelson: Can I see it before he is questioned regarding it?

Mr. Kay: Yes. (Handing Mr. Michelson)

Q. Will you state whether or not you took that statement from Mr. Lubinski?

A. I did.

Q. And state just under what circumstances you took the [339] statement, and in what manner?

A. Mr. Lubinski came to the office on several occasions, and on one of the occasions after we had discussed his claim I asked him if he cared to give me a written statement in connection there-

(Deposition of Raymond L. Frick.)

with, and he said he was entirely willing to, and I had interrogated him at some length in an attempt to get his version of the circumstances of the situation, and then I called Miss Oldroyd in and dictated the statement to her.

Q. She is one of the stenographers here in this office?

A. Yes. And before I began dictating the statement I told Mr. Lubinski to listen to it carefully and make any changes or corrections that he saw fit to make.

Q. Now, the third paragraph of the statement reads as follows—

Mr. Mcihelson: Just a minute. It isn't in evidence yet.

Mr. Kay: Well, I am going to offer the statement in evidence. I will offer it in evidence at this time. (Reading)

“I had no idea who pulled this plug out of the distress signal as there were some twelve hundred troops aboard, about one hundred sailors in addition to the crew of the vessel, which numbered about fifty men.”

Is that the statement that he made directly to you?

A. Yes, that was his statement to me.

Q. Did you know anything about how many troops there were aboard this vessel, or how many sailors, or how many crew members exactly? [340]

A. No, I didn't.

(Deposition of Raymond L. Frick.)

Q. Was this the first time that you knew of any such situation? A. It was.

Q. Now, all the other matters set forth in the statement, were they obtained from Mr. Lubinski himself, or from some other source?

A. All the information contained in the statement was obtained from Mr. Lubinski.

Q. At the time this statement was taken Miss Oldroyd then was in your office taking it down in shorthand, was she? A. She was.

Q. And then after you completed the statement what did you do, or what did you have done?

A. Well, when she finished typing the statement she brought it into my office, and I looked it over and handed it back to her and told her to give it to Mr. Lubinski to read, and thereafter to secure his signature to it.

Q. Thereafter did you see Mr. Lubinski at any time? A. Do you mean that same day?

Q. Or at any other time?

A. Oh, I saw him on subsequent occasions in the office.

Q. Did he at any time request or make any corrections or retractions so far as the statement is concerned? A. He did not.

Q. Now, did you have occasion to refer Mr. Lubinski to Dr. Barkan? A. I did.

Q. That is Dr. Otto Barkan of this city?

A. That is correct. [341]

Q. What was the purpose of you referring him to Dr. Barkan?

(Deposition of Raymond L. Frick.)

A. To secure a diagnosis from the Doctor as to the condition of his eyes, and to determine whether or not in the Doctor's opinion there was any connection between the condition of his eyes and the history he had given in connection with his employment on the vessel in question.

Q. Did you request Dr. Barkan to treat him or to give any advice as to treatment?

A. I did not.

Q. And then your sole purpose was merely to get a diagnosis?

A. That was the sole purpose.

Q. Did Dr. Barkan subsequently submit a report of his diagnosis? A. He did.

Q. And state whether or not he was paid through this office for that service?

A. Yes, he was.

Q. Did you send Lubinski to Dr. Barkan at any other time? A. No.

Mr. Kay: I believe that is all.

Examination by Mr. Michelson

Q. (Mr. Michelson): Mr. Frick, you don't know what took place up in Dr. Barkan's office between Dr. Barkan and Mr. Lubinski? I mean you weren't there? A. No.

Q. You don't know what happened up there of your own knowledge? A. No.

Q. Now, regarding this statement, will you please state just [342] the procedure you went through as to how the statement finally got into writing, that is, who asked the questions, and

(Deposition of Raymond L. Frick.)

whether they were taken down at the time, or just how it was done?

A. Well, I interrogated Mr. Lubinski in detail in an effort to get his complete version of the situation, after which I called in Miss Oldroyd and dictated the statement.

Q. You dictated the statement? A. Yes.

Q. In other words, your conversation with Mr. Lubinski was in question and answer form originally, is that correct, that is, you would ask him questions?

A. Yes, I would question him and he would answer my questions. I wouldn't say it was strictly a precise question and answer form. He simply gave me his version of the matter. I told him that my purpose was to ascertain all the circumstances and facts in connection with his claim.

Q. Now, some questions you did not have to ask him, did you, because you had heard them on the prior occasions, that is, you had heard the answers to those questions on prior occasions when you had seen him?

A. Oh, I presume that there may have been some matters that were touched upon in the statement or covered in the statement we had discussed before, because we had discussed the claim on a number of occasions in my office.

Q. Everything that Mr. Lubinski said was not put down, was it, in that statement?

(Deposition of Raymond L. Frick.)

A. Oh, the statement is not a verbatim account of what he said, no. It is the substance of what he gave me, and the statement is based upon information supplied me by [343] him.

Q. Now, you are employed by Mr. John H. Black?

A. That is correct.

Q. How long have you been employed by him?

A. Over fourteen years.

Q. Now, this matter was referred up to the firm of Bogle, Bogle & Gates by your office here?

A. No.

Mr. Kay: The other way around.

Mr. Michelson: Pardon me.

The Court: I think if you skip that it would be better. It is of no importance.

Q. (Mr. Michelson): Now, your work is the same as that of a claims agent, isn't it, in this office?

A. Well, I wouldn't say a claims agent. I would say my work embraces the handling of claims. It includes that among other things.

Q. You were not employed—that is, Mr. Black was not employed by the Steamship Company here in San Francisco?

A. I wouldn't know about that.

Q. Do you have any connection with the Fireman's Fund Insurance Company?

Mr. Kay: Well, just a minute. I object to that as incompetent, irrelevant and immaterial, and instruct the witness not to answer.

Mr. Michelson: That is all.

(Deposition of Raymond L. Frick.)

Examination by Mr. Kay

Q. (Mr. Kay): Mr. Frick, this libelant came in here presenting a claim against the Alaska Steamship Company as agent [344] for the United States of America, is that right?

A. That is correct.

Q. And in the course of his discussions as to settlement, you asked him to give you a statement concerning this occurrence out of which the alleged claim arises?

Mr. Michelson: Just a minute. Objected to as leading.

Q. (Mr. Kay): Well, is that correct?

Mr. Levinson: I am standing on the objection, your Honor.

The Court: The examination is by Mr. Kay. How many cross examinations have there been in this deposition?

Mr. Long: This is redirect, your Honor.

The Court: Did you want to speak further about it, either side?

Mr. Long: No.

The Court: The objection is overruled.

A. That is correct.

Q. And did Mr. Lubinski at any time in any of his discussions tell you that some member of the ship's crew was dispatched by him to the forepeak of the vessel for the purpose of getting a hand tool for the gear just prior to this incident in which the distress signal had released some smoke?

A. He did not.

(Deposition of Raymond L. Frick.)

Mr. Kay: That is all.

Examination by Mr. Michelson:

Q. (Mr. Michelson): Mr. Lubinski came in here and made a claim for the injury to his eye, is that correct, to his [345] eyes?

A. Yes. I don't know whether it was his eyes or his eye.

Q. Do you know who sent him in here?

Mr. Kay: I don't think that would be material, who sent him in here.

Q. (Mr. Michelson): If you recollect?

A. Well, as I recollect, he was—came in here at the suggestion or at the request of Messrs. Bogle, Bogle & Gates, in Seattle.

Q. (Mr. Kay): You don't know of your own knowledge, do you?

A. I really don't at this time know the circumstances under which he came in the office.

Mr. Michelson: That is all.

Mr. Kay: That is all.

(Deposition concluded)

Mr. Franklin: We offer the deposition of Raymond L. Frick in evidence, if the Court please, and since the signed statement Mr. Lubinski made has already been admitted in evidence without objection, it will not be necessary to read the deposition of Miss Oldroyd.

The Court: The deposition is admitted as offered, and becomes a part of the Respondents' case in chief.

Mr. Franklin: This is the deposition of Dr. Otto Barkan, if the Court please.

Mr. Levinson: At the outset I am going to object to the testimony of Dr. Barkan for two reasons, your Honor. First, it is our position that it is a privileged communication, and second, I received no notice of the filing of the deposition as required by the rules of this court. [346] I never saw the deposition until it was published for use in the trial of this case. Although I received notice of the taking of the deposition, I was not represented at the time the deposition was taken in San Francisco.

(Argument of counsel)

The Court: The court will not rule upon this matter now, but if counsel reminds the court of it, and there is further necessity of considering the matter that will be done at the beginning of the afternoon session, which will be at two o'clock this afternoon.

(Whereupon, adjournment was taken until 2:00 o'clock p. m. January 11, 1945.) [347]

January 11, 1945, 2:00 O'Clock P.M.

The Court: You may proceed with the matter on trial.

Mr. Levinson: Your Honor, with the press of work in the office I was unable to find time to look for better authorities. I will withdraw the objec-

tion I have heretofore made, and the record may so show, and that will eliminate talking further about it.

The Court: Then this is the deposition of Dr. Otto Barkan?

Mr. Franklin: Yes, sir.

Mr. Long: If the Court please, this is the deposition of Dr. Otto Barkan, taken in San Francisco, California, pursuant to notice de bene esse, Monday, July 24, 1944. The respondents were represented by Mr. Franklin, and there was no appearance on behalf of the Libelant.

DR. OTTO BARKAN,

called as a witness on behalf of Respondents, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified by deposition as follows:

Direct Examination

Q. (Mr. Franklin): Will you state your name, please?

A. Otto Barkan.

Q. And you are a duly licensed and practicing physician in the City of San Francisco, California?

A. I am.

Q. What specialty do you follow?

A. Ophthalmology.

Q. Of what medical school are you a graduate, Doctor?

A. Munich and London.

Q. Since graduation, will you briefly sketch your professional career?

(Deposition of Dr. Otto Barkan.)

A. I spent some six years doing post graduate work at my specialty; and started practicing in San Francisco in 1921.

Q. Have you limited your practice at all times since coming to San Francisco to diseases of the eye? A. I have.

Q. Doctor, are you at the present time a member of any of the teaching staffs of the medical departments of the state universities?

A. Not of the state, but of Stanford Medical School. I am not actively teaching, however.

Q. You are a member of the staff?

A. Yes.

Q. Doctor, did you have occasion on or about November 26th, 1943, to examine one Walter Lubinski? A. I did.

Q. At whose request did you examine him, doctor?

A. The office of Mr. John Black, I believe.

Q. Was the examination for the purpose of treating the man or for submitting a written report of your findings to Mr. Black?

A. For the latter purpose.

Q. At the time of your examination on November 26th, 1943, [349] Doctor, what did you find Mr. Lubinski suffering from?

A. He had a condition known as a chronic iridocyclitis of the left eye with a slight increase of intra pressure in that eye.

Q. How was the right eye, Doctor?

(Deposition of Dr. Otto Barkan.)

A. The right eye was normal in every respect.

Q. Doctor, in lay language what is an iridocyclitis?

A. It is an inflammation of the iris and usually of the neighboring membrane, the uvea.

Q. Doctor, where are the iris and the uvea located with reference to the outside of the eyeball?

A. It is the inner membrane of the eye.

Q. And the function of the iris, Doctor, is to permit light through?

A. To prevent light from going through except through the pupil, which is a hole in the iris.

Q. Doctor, at the time of your examination of Mr. Lubinski, did he give you a history as to the cause of the onset of this iridocyclitis?

A. He did.

Q. What did he tell you, Doctor, was the cause of it?

A. He told me that he first noticed trouble with the left eye in July, of 1943, on the Island of Attu; that at that time he had been exposed to smoke and fire as a result of which the eyelids were swollen for some ten days; and that when he opened his eyes, he noticed reduced vision of the left eye.

Q. Did he give you any history at that time, Doctor, of encountering any irritation of his left eye on July 15th, 1943, while at Attu, Alaska, when a distress signal [350] exploded in the fore-castle head of the vessel he was on?

A. No, he did not.

(Deposition of Dr. Otto Barkan.)

Q. Did he attribute his condition entirely to the exposure to smoke and fumes from the fire at Kiska on August 15, 1943?

A. He told me July, 1943, in Attu

Q. July in Attu. Yes. Did he make any complaint, Doctor, of being exposed to any irritation of his eye at Kiska, Alaska, in August of 1943, a month later?

A. Not specifically; but he said that while in the Aleutians from June to September as a deck officer, it had been very cold; and that he thought that had affected his eyes when on watch.

Q. Doctor, what is your opinion as to whether or not the condition of iridocyclitis in Lubinski's left eye which you found present in your examination was caused or aggravated by the alleged exposure to smoke or fumes of July 15th, 1943, at Attu, Alaska?

Mr. Levinson: I object to that question on the ground that it is not a proper hypothetical question and does not contain the necessary elements, or the elements upon which a true opinion can be based. It does not contain the elements of issue in this case. I was not there.

The Court: Isn't any doctor whose qualifications qualify him as competent to give his opinion, isn't he competent to give his opinion upon the cause of a symptom after he has professionally examined the man [351] physically and observed him and taken his history? Isn't that a matter for cross examination?

(Deposition of Dr. Otto Barkan.)

Mr. Levinson: That may be a matter for cross examination when those facts appear. Had the Doctor been here we might have been able to establish it, but as far as these facts are concerned, they do not appear on this deposition, and that is the only thing we have to go on, and that is the basis of my objection. It may have been in his mind—that is true, your Honor.

The Court: Mr. Levinson, suppose I go to your doctor, or to some doctor named by you, complaining of a headache, and the doctor named by you examines me, makes a physical examination of me in the course of his professional practice, and then two days afterwards somebody asks the Doctor if he saw me and examined me and he says that he did, and then asks him whether in his opinion my headache was related to any previous injury, don't you think the doctor would be permitted to state his opinion?

Mr. Levinson: In your Honor's statement of the facts, yes, but what your Honor has given me as a hypothetical statement of facts is not the situation in the case at bar, because your Honor is assuming a state of facts that does not appear here, that the doctor examined [352] you and that he obtained these facts. That may have occurred in this case—I do not know—but as far as the record is concerned it does not show that, because there is a specific group of facts at issue here, and nowhere does the record show that the doctor knew of those

(Deposition of Dr. Otto Barkan.)

specific facts. As a matter of fact the deposition shows that he did not have some of the facts that are at issue here. He refers to deck exposure, he was a deck officer,—he is not a deck officer. The witness refers to exposure on page 4 of the deposition; did he complain of being exposed to any irritation of his eye in August of 1943, at Kiska, a month later, and the witness said no, “but he said that while in the Aleutians from June to September as a deck officer, it had been very cold; and that he thought that had affected his eyes when on watch.” That is what I mean. He is basing an opinion on casual connection of facts which are not shown.

Mr. Franklin: That is what the man told him.

Mr. Levinson: That is not the question. The question before us here, and the question he is answering here is, “Doctor, what is your opinion as to whether or not the condition of iridocyclitis in Lubinski’s left eye which you found present in your examination [353] was caused or aggravated by the alleged exposure to smoke or fumes of July 15, 1943, at Attu, Alaska?”

The Court: Do you deny that the deposition shows that the doctor in the course of his professional practice made a physical and medical examination of this person?

Mr. Levinson: No; I cannot do that. It is obvious on the face of it. He said he was examined there at the request of Mr. John Black. I do not deny that.

(Deposition of Dr. Otto Barkan.)

The Court: I think that I am prepared to rule upon your objection.

Mr. Levinson: Very well.

The Court: The objection is overruled.

Mr. Levinson: I note an exception.

The Court: Exception allowed.

Mr. Long: I will read the question again.

Q. Doctor, what is your opinion as to whether or not the condition of iridocyclitis in Lubinski's left eye which you found present in your examination was caused or aggravated by the alleged exposure to smoke or fumes of July 15th, 1943, at Attu, Alaska?

A. I don't think that the condition could have been caused, precipitated or even aggravated by the fumes of the smoke as described.

Q. Why not, Doctor?

A. Because a condition of this kind is essentially an endogenous one. That is, it comes from an internal cause; and in my experience and in the literature, it would be [354] precipitated by an external injury, such as a bruise or contusion of considerable severity.

Q. Doctor, in your opinion, is the temporary inconvenience and discomfort produced by a person being exposed to smoke such as Mr. Lubinski was of a sufficiently severe character to aggravate or accelerate an iridocyclitis?

A. Not in my opinion.

(Deposition of Dr. Otto Barkan.)

Mr. Levinson: That question is objected to as leading, your Honor, and I move to strike the answer. I object to the question as incompetent. I was not there at the time.

The Court: That is direct examination, is it not?

Mr. Levinson: Yes, sir.

The Court: What do you say to that objection?

Mr. Long: Counsel had a right to be there. He was served with notice, and he was represented at all other depositions taken there. He could have been there to object if he so wished. The purpose of the question, of course, is on the matter of privilege.

The Court: Does any part of that question appear to have been testified to or established by the witness in response to any other questions?

Mr. Levinson: That is true, your Honor, I will frankly say. I will direct your [355] attention to the statement on page 3 of the deposition: "Q. At whose request did you examine him, Doctor?

"A. The office of Mr. John Black, I believe.

"Q. Was the examination for the purpose of treating the man or for submitting a written report of your findings to Mr. Black?

"A. For the latter purpose."

That is correct.

The Court: I will overrule the objection.

Q. Doctor, when you use the term "endogenous," do you mean some internal infection?

A. Yes.

(Deposition of Dr. Otto Barkan.)

Q. Doctor, what was Mr. Lubinski's sight when you saw him?

A. He could distinguish the movement of a hand in front of his eye in the central field of vision only.

Q. Was the progress of this disease characteristic when you examined Lubinski, Doctor, in November of 1943?

A. Yes, I should say it was.

Q. Did he tell you, Doctor, where he had been treated for that condition at the time of your examination?

A. I think I was informed that he had been treated at the Marine Hospital.

Q. And was under treatment when you examined him?

A. That I don't know.

Q. Doctor, after making your examination and conclusions, did you then submit a written report of your findings to the office of Mr. John H. Black, 233 Sansome Street, [356] San Francisco, California?

A. I did.

Q. At no time did you treat Mr. Lubinski?

A. No.

Q. Or offer any suggestions as to his proposed treatment?

A. No.

Q. Your examination was made solely and exclusively for the purpose of obtaining your views as to the relationship between this man's disease of the left eye and the claimed exposure to the fumes?

A. That is all.

(Deposition concluded.)

The Court: Do you offer this deposition in evidence?

Mr. Franklin: Yes, your Honor.

The Court: This deposition is received as a part of the Respondents' case in chief.

Mr. Franklin: We will call Dr. Morrow. [357]

DR. JAMES R. MORROW,

called as a witness on behalf of Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, Doctor?

A. James R. Morrow.

Q. What is your calling?

A. I am a physician.

Q. Licensed to practice in the State of Washington? A. Yes, sir.

Q. How long have you been licensed?

A. Since 1931.

Q. What specialty in the medical field, if any, do you follow? A. Ophthalmology.

Q. Have you practised in other states besides the State of Washington? A. Pennsylvania.

Q. Were you licensed to practice in the State of Pennsylvania? A. Yes.

Q. Of what medical school or college are you a graduate?

(Testimony of Dr. James R. Morrow.)

A. Jeffreson Medical College, in Philadelphia, in 1914.

Q. What did you do upon graduation? Will you briefly sketch your professional career?

A. I served an internship and practised a year and ten months, and was then in the first world war for 18 months; I returned to practice and practised general surgery for 14 years, and then I specialized in eye, ear, nose and [358] throat, at the New York Post Graduate School in New York.

Q. How long a course was that?

A. A year and a half I was there. The course was approximately a year. I did special work afterwards.

Q. When did you take that special course?

A. In 1930.

Q. Following 1930 what did you next do?

A. I came to Seattle. And since then I have studied in the University of Minnesota and the University of Oregon, and George Washington University.

The Court: When did you begin your practice in Seattle?

The Witness: 1931.

Q. Did you restrict your practice to any particular field in Seattle in 1931?

A. Eye, ear, nose and throat.

Q. Have you practiced that specialty continuously up until the present time?

A. Until two years ago November I practised in ophthamology exclusively, diseases of the eye.

(Testimony of Dr. James R. Morrow.)

Q. Are you a member of any scientific or technical society of physicians that specialize in conditions of the eye?

A. I belong to the Puget Sound Academy of Ophthalmology.

I am a member of the King County Medical Society, the State Medical Society, and the American Medical Association.

Q. Do you hold any position in this city as a medical consultant in the field in which you specialize?

A. I am chief consultant and ophthalmologist at the Marine Hospital at Seattle. [359]

Q. How long have you held that position?

A. Since 1936.

Q. Did you at our request have occasion to examine Mr. Walter Lubinski with reference to a condition occurring to his left eye?

A. I did.

Q. Approximately when and where did you make that examination?

A. June 20, 1944, at my office.

Q. Did you make that examination alone or was somebody with you?

A. Dr. H. F. Thorlakson.

Q. At the time of your examination did you obtain a history of the onset of the trouble in Mr. Lubinski's left eye from him?

A. There was a history.

Q. Just state whether you did.

A. Yes.

Q. What history did Mr. Lubinski give you with reference to the onset of visual difficulty in his left eye?

(Testimony of Dr. James R. Morrow.)

A. In July of 1943, at Attu, there had been a smoke bomb exploded in the hold of the ship, and he went in the hold and was exposed to this smoke. Later the eyes became swollen and he noticed a few days later he was stumbling into things on the deck.

Q. Did you obtain any history from Mr. Lubinski of a subsequent incident occurring to his left eye at Kiska, Alaska, on or about August 15, 1943, when he was emerging from a burning hold, wearing a gas mask, and the gas mask was struck by a stream of water directed into the hold, so that he was exposed to the smoke while ascending from the [360] hatch? A. No; I did not.

Q. In the light of the history obtained from Mr. Lubinski did you make an examination of his eyes?

A. I did.

Q. How thorough was your examination, Doctor?

A. As thorough as I know how to make an examination.

Q. To shorten it up, what conclusion did you reach as to the condition of Mr. Lubinski's left eye as the result of that examination?

A. Well, for practical purposes the eye was blind. He had no vision, but he had light perception on the nasal side, from the nasal field. That is the left eye.

Q. What did you find the vision in his right eye to be? A. 20/25.

Q. How would you class that?

(Testimony of Dr. James R. Morrow.)

A. Well, 20/20 is normal, and 20/25 is only slightly less than normal.

Q. Did you find any explanation for any diminution of vision in the right eye?

A. There was a slight astigmatism present.

Q. Is that a chronic condition?

A. It is more or less of a permanent condition. Most people have some.

Q. From your examination did you reach a conclusion as to what was the cause of the loss of vision in Mr. Lubinski's left eye, as to the medical diagnosis?

A. He had an iritis or iridocyclitis, or uveitis, which all mean the same thing.

Q. What do they mean in plain language? [361]

A. They mean an inflammation. It must have been a sticky type or plastic type, because the iris was completely bound down to the lens and the posterior chamber and the anterior chamber—that is, the front and the back of the eye—was entirely separated by this bound down iris, known as the iris-bombay.

Mr. Franklin: I am going to ask that this chart be marked for identification.

The Court: It may be marked for identification.

(Chart marked for identification as Respondents' Exhibit A-9.)

Q. (Mr. Franklin): Dr. Morrow, handing you what has been marked Respondents' Exhibit A-9

(Testimony of Dr. James R. Morrow.)

for identification, I will ask you to state what that is.

A. It is a diagram of the anatomy of the eye.

Q. Does that exhibit reveal the portions of the eye involved by this iritis or uveitis?

A. It does.

Q. Would you kindly designate on that exhibit with a pencil the surfaces embraced in the diseased portion of the eye as revealed by your examination?

A. The dark yellow of the diagram here. The iris is a ciliary body, and the uvea a tract. The uvea tract is considered the middle coat of the eye, and the ciliary body is this large yellow body, which is connected. The uvea itself is inserted in the ciliary body.

The adhesion between the iris and the lens made a dense adhesion between these, so that the rear chamber, or posterior chamber, and the interior chamber were sealed off from each other. [362]

The Court: By what?

The Witness: By these adhesions. Fluid passes from the back to the front of the eye freely. So far as the circulation of the fluid is concerned, it stops the circulation.

The Court: Not so far as the passage of light through the lens is concerned?

The Witness: No. But it was completely contracted so that there was no practical space open. The pupillary membrane had formed, sealing off the light.

(Testimony of Dr. James R. Morrow.)

Q. Would you indicate on that exhibit where that had formed with the letter "A"?

A. Yes (indicating on exhibit).

The Court: Would both counsel feel better satisfied to be up here near the witness?

Mr. Levinson: Yes.

The Court: Come forward, both counsel, and see what the witness is doing. You may take any position that is available to you.

The Witness: This is the uvea tract, and this is the iris. This is the ciliary body, and the choroid is the central coat of the eye. The retina is inside and the sclera outside. This is a blood vessel coat which is always involved in this extensive iridocyclitis. Iritis means inflammation of the scleritis or ciliary body, and the uveitis of the uvea tract. They are used more or less synonymously. Iridocyclitis is probably the more common term. The whole thing is inflammation. Plastic exudate has formed in this case and cemented this over. [363]

Q. That is where you have indicated with the two letters "AA" on Respondents' Exhibit A-9 for identification?

A. Yes. It seals the chamber and it prevents the pupil from further dilation.

Q. Would you indicate, please, by an encompassing circle with your pencil the area embraced under the term "iritis?"

A. Yes. It would be just the iris.

Q. In so far as Mr. Lubinski's eye was con-

(Testimony of Dr. James R. Morrow.)

cerned, was there any further affliction of the tissues of the eye, other than the iris and of the lens?

A. We assume that the whole thing is, because in a destructive process of that severity it would be more than just the iris. We cannot see this, but we know from post mortem specimens, or from eyes removed, that this has been affected. I am referring to the ciliary body.

Q. And that joins the iris, does it not?

A. Yes.

The Court: Outside of the iris, is it not?

The Witness: Yes. It is right back of the joint of the cornea and the light portion of the eye.

Q. Where with reference to the external or internal surface of the eyeball are the iris and the ciliary body located?

A. You mean the relationship?

Q. With reference to the outside or the inside of the eyeball?

A. They are inside the eyeball.

Q. How deeply imbedded?

A. The iris is posterior or back of the cornea, which is the clear portion. The ciliary body is back of the sclera, which is the tough white coat of the eye.

Q. Is the iris and ciliary body also behind the interior [364] chamber?

A. The iris bounds the interior chamber. It is the rear boundary of the interior chamber.

Q. What is the condition of the structures of

(Testimony of Dr. James R. Morrow.)

the outside of the eye, designated as the cornea, as to their toughness of fibre?

A. The cornea is about 2 millimeters in thickness, and it is covered by epithelium, like the surface of your hand. Then there is a stroma in the middle.

Q. What is that?

A. It is made up of long laminated fibrous cells, one on top of the other, similar to that sort of thing (illustrating).

Q. What protection from external force have the iris and the ciliary body, against external blows or injuries?

A. It has the external epithelium and Bowman's membrane right inside of it, which is a thin membrane. I will draw a cornea. (Witness draws sketch) This is epithelium on the outside, magnified, of course, and then the membrane known as Bowman's membrane. Then under Bowman's membrane we have this stroma, which is made of laminated fibrous transparent cells, and we have an internal limiting membrane of a single layer of cells, epithelial cells. That is the contour there, about 2 millimeters in thickness. The epithelium is the top layer.

The Court: The top layer of the cornea?

The Witness: Yes. That goes completely across.

The Court: Did that epithelium show any signs of injury? [365]

The Witness: No, sir.

The Court: Are you absolutely certain of that?

(Testimony of Dr. James R. Morrow.)

The Witness: Yes, sir. The epithelium was intact.

Q. Did you note any external evidence of injury on any portion of the left eye, from your examination?

A. No scars were present. No evidence of external injury.

The Court: Were there any conditions on any of the layers of material under the epithelium showing injury of any kind, either from smoke injury or from external violence, traumatic injury?

The Witness: There was no evidence except the evidence of inflammation on the iris. The iris was degenerated and had lost color.

Mr. Levinson: This is largely magnified. What is the actual distance between the two?

The Witness: The eye is 25 millimeters long, and that would be two and one-half centimeters,—one inch, approximately.

The Court: What fraction of an inch is the thickness of the epithelium, that outside covering?

The Witness: That is microscopic.

The Court: Is that what you said was two millimeters?

The Witness: The whole cornea is two millimeters, the clear portion of the eye. Two millimeters would be about that thickness (illustrating) about as thick as two pencil lines.

The Court: Was any part of the cornea, either the outside surface, the inner material, or the in-

(Testimony of Dr. James R. Morrow.)

side surface of the cornea, was any part of the cornea injured [366] in any way?

The Witness: No, sir; no evidence of it.

The Court: That is all.

Q. (Mr. Franklin): Would you describe to the Court whether or not the eyeball itself is—what is the Canal of Schlemm?

A. It is marked here. This is the Canal of Schlemm (indicating).

Q. Would you put the letter “S” on that canal?

A. It is marked right here.

Q. Yes, but indicate where it is with the letter “S.”

A. Yes, sir. (Witness indicates on exhibit.)

Q. What is the function of that?

A. It is the drainage canal of the eye.

Q. Which way does it drain the fluid from the vitreous chamber?

A. The fluid from the posterior or rear chamber drains thru around the lens and into the anterior chamber, and is taken up by the ciliary veins from the Canal of Schlemm. You notice it is very close to the yellow portion, to the ciliary body, and the veins there are more or less open sluiceways.

Q. Then what happens to the fluid which is being drained from the eyeball?

A. It enters the ophthalmic vein.

The Court: You did not call that vein by the same name that you did before.

The Witness: It is the ophthalmic vein.

(Testimony of Dr. James R. Morrow.)

Q. Does that Canal of Schlemm serve as an intake valve or conduit? [367]

A. It drains fluid from within the eye to the body circulation.

The Court: What body?—the main body of the man?

The Witness: The main body of the man. The fluid from the eye drains into the ophthalmic vein and drains into the circulation of the blood.

Q. How many cases of iridocyclitis have you treated in your practice, or iritis?

A. It is a common thing. I do not have the exact number. Several hundred.

Q. What are the causes of iridocyclitis or iritis?

A. A great variety of causes.

Q. What are the general causes?

A. Well, we first look for focal infection, such as infected teeth, infected tonsils, arthritis, tuberculosis, syphilis, gout and many others.

The Court: This fluid from the eye that goes into the blood stream, is that a part of nature's function?

The Witness: Yes, sir; that prevents glaucoma.

The Court: In what way?

The Witness: It keeps the tension of the eye at a normal level.

The Court: It seems, offhand, rather strange to a lay mind like mine, that nature would make the blood stream a reservoir for the excretion of the eye. Tear production of the eye is excretion. It contains an impurity.

(Testimony of Dr. James R. Morrow.)

The Witness: That is the external portion. The tear is external to the eye. If you will allow me to explain—if you want me to—— [368]

The Court: I think that is sufficient explanation. I think this duct leads anyway back not only to the inside moisture of the eye, but also the tear production of the eye.

The Witness: The tear production is entirely external, while this is internal circulation inside the eye.

The Court: You need not go any further.

Q. (By Mr. Franklin): This fluid that you were talking about, where does it come from? Where does it collect before it is expelled through the Canal of Schlemm?

A. It is thought to be secreted by the ciliary body.

Q. In what portion of the eye?

A. In the posterior portion.

Q. By that you mean what, the inside or outside?

A. The inside of the eye.

Q. That is taken off by what method?

A. Through the Canal of Schlemm, and ultimately the ophthalmic vein.

Q. What methods does nature employ to relieve an eye that is attacked by smoke or fume irritation?

A. It produces a flooding of tears.

Q. Where do the tears develop, and explain what the function of the tears is in relieving such a condition.

(Testimony of Dr. James R. Morrow.)

A. The tears are secreted by the lacrimal gland, which is above and external to the eyeball.

Q. Where is it located with reference to being within or without the eyeball?

A. It is without the eyeball.

Q. And then what happens? [369]

A. Tears are secreted and they are carried away by the lacrimal duct into the nose, and if that cannot carry them they fall down over the face.

Q. What does nature do when an irritation develops in the eye from smoke or fumes, or any source which produces some irritation of the outside of the eye, as to eliminating that condition.

A. Well, of course you have the protection of the eyelids, and the tears are a flushing apparatus.

Q. Do the tears possess any properties in themselves to meet infection of the external surface of the eye?

A. They are mildly anti-bacterial.

Q. You mentioned some causes of iritis. State whether or not instances arise where the precise cause of iritis cannot be disclosed by a medical examination?

A. We see many cases that we cannot prove the cause.

Q. Why does that situation arise, under what circumstances? By the process of elimination is it possible to examine every possible source of infection in the human body? A. No.

Q. And were the findings of your examination of June 20, 1944 typical and characteristic of an

(Testimony of Dr. James R. Morrow.)

eye which had been damaged from progressive iridocyclitis?

Mr. Levinson: I object to that as leading.

The Court: I think it is. I think it is unnecessarily so.

Q. Doctor, are you familiar with the characteristic progress of the disease of iridocyclitis?

A. Yes, sir.

Q. How does that compare with what you observed upon your [370] examination of Mr. Lubinski?

A. Mr. Lubinski had the result, the end result—

Mr. Levinson (Interposing): Just a moment. I would like to ask a preliminary question. I think I am entitled to it.

The Court: It is difficult for me to say.

Mr. Levinson: It relates to the question of privilege.

The Court: Very well.

Mr. Levinson: Are you on the staff of the Marine Hospital?

The Witness: Yes, sir.

Mr. Levinson: As such a member of the staff, did you ever examine the record of Mr. Lubinski in the Marine Hospital.

The Witness: I did not examine the records.

Mr. Levinson: That is all the questions I have.

The Witness: I am only connected with the one here.

Mr. Levinson: That is what I mean, the Marine Hospital in Seattle.

(Testimony of Dr. James R. Morrow.)

The Witness: I did not treat Mr. Lubinski.

Mr. Levinson: I understand, but as a member of the staff did you see the record?

The Witness: I would have no opportunity to examine the record unless I treated him.

The Court: Just answer the question; did you or did you not?

The Witness: No, sir.

Mr. Franklin: What was the last question?

(Last question read.) [371]

Mr. Levinson: I think that question is objectionable unless it refers to the characteristic found in Mr. Lubinski's eye.

Mr. Franklin: I think that is a proper question.

The Court: You may proceed.

The Witness: Mr. Lubinski's eye was the result, almost the end result of an iridocyclitis.

Q. (Mr. Franklin): Is there anything unusual about the condition of his eye, compared with the ordinary case that you would encounter in treating that condition?

A. I would not expect to lose the eye.

The Court: Would you make your answer more direct. Can you answer "yes" or "no?"

The Witness: I cannot recall the exact wording of the question.

The Court: Read the question.

(Last question read.)

Mr. Franklin: Which has progressed to the extent that Mr. Lubinski's eye had.

(Testimony of Dr. James R. Morrow.)

The Witness: Yes. It is unusual.

The Court: Can you comment upon why you think so, or if you know or have any opinion as to why? Will you discuss that?

The Witness: Well, in the first place, not many eyes are lost. That is what makes it unusual.

The Court: You mean lost to practical use, as his left eye is now?

The Witness: That is right.

Q. (Mr. Franklin): Doctor, you mean ordinary treatment might have prevented the condition in which his eye is? [372]

Mr. Levinson: That is objected to as leading.

The Court: Ask him what he means.

Q. What do you mean, Doctor?

A. I mean that it is unusual for an eye to be lost with an iridocyclitis. Damage is frequently due to frequent attacks, but to see one that is completely lost is unusual. It has happened only once in my experience, I think, so it is unusual.

Q. By the term "lost," what do you mean?

A. Lost for use of station.

Q. I will ask you whether you have any opinion as to the cause of the loss of vision in Mr. Lubinski's left eye?

A. I could not answer, except that he has had a severe inflammation, and the eye is lost.

Q. I will ask you whether in your opinion the condition which you found Mr. Lubinski suffering from was caused by exposure of his eyes to smoke distress bombs in Attu, Alaska, on July 15, 1943,

(Testimony of Dr. James R. Morrow.)

when he testified that he was obliged to go down in a forepeak for the purpose of ascertaining the cause of a smoke explosion, with a gas mask, and made several trips in that vicinity wearing a gas mask during those times?

A. I do not think smoke caused his iridocyclitis.

Q. In your opinion, assuming further that Mr. Lubinski on August 15, 1943 was in a hatch at Kiska, Alaska, the cargo of which was on fire, and for a period of 20 or 30 seconds a gas mask that he was then wearing was knocked off from his face so that he was exposed to the burning fumes of the contents of the hatch, I will ask you whether in your opinion his iridocyclitis could have been caused [373] by that incident?

A. It is not caused by smoke or gas.

Q. I will ask you if in your opinion either incident, at Kiska, Alaska, or Attu, Alaska, within the interval of a month, could have aggravated into activity an existing iridocyclitis?

A. No; I think not.

Q. Are you familiar with the type of iridocyclitis produced by injuries?

A. Yes, sir.

Q. Will you tell the Court what type of injury can produce an iridocyclitis?

A. Traumatic iridocyclitis is rare. We haven't any perforating injuries, or where there has been an ulceration of the surface of the eye, allowing bacteria to enter.

(Testimony of Dr. James R. Morrow.)

Q. What is necessary with reference to the penetration of external tissues of the eye for iridocyclitis to be classed as traumatic or due to injury?

A. There would be external evidence of injury.

Q. Where?

A. Anywhere within the eyeball that was perforated.

Q. Did you find any evidence of perforation or penetration of the external surface of Mr. Lubinski's eye from your examination?

A. No, sir.

The Court: Did you find any evidence on the outside of that cornea, or on the outside of the eyeball, of any external injury?

The Witness: None.

The Court: Trauma or other outside injurious conditions? [374]

The Witness: No, sir. Scars would remain, you see.

The Court: You think if once an eye got hurt by the pressure of a heavy stream of water forced against the eye, the outside of the eye, that recovery from it would show a scar, or show some evidence of injury?

The Witness: I can only cite experience. I have seen blood in the eye from external injury.

The Court: Blood inside of the eye?

The Witness: In the inside. But no iridocyclitis had developed. That is the only way I can answer that.

(Testimony of Dr. James R. Morrow.)

The Court: Have you seen any blood or scar on the outside of the eye caused by any such agency as a heavy pressure of water forced upon it?

The Witness: No; I have not.

The Court: State whether or not you saw any such symptom as that I mentioned on Mr. Lubinski's left eye.

The Witness: I did not.

The Court: On the outside?

The Witness: I did not, no, sir.

Mr. Franklin: That is all.

The Court: You may cross examine.

Cross Examination

By Mr. Levinson:

Q. Dr. Morrow, are you a member of the American Board of Aphthalmology? A. No, sir.

Q. The only board you are a member of is the Puget Sound [375] Academy, is that right?

A. That is right.

Q. You have made quite a number of eye examinations for the firm of Bogle, Bogle & Gates?

A. Over a period of years, yes.

Q. And this man was sent to you in connection with a claim, and you knew you were coming down here to testify?

A. I didn't know I was to testify. I was asked to make an examination.

Q. That was the purpose of doing that?

A. I may or may not have known there was a claim. I was asked to make an examination.

(Testimony of Dr. James R. Morrow.)

Q. As to the casual connection?

A. And report.

Q. You were asked to determine, if possible, the cause of the condition? A. No, sir.

Q. You were not asked to determine the man's condition?

A. I was asked to make an examination.

Q. Were you asked to determine the relationship between the man's personal history and the condition that you found?

A. I do not recall. I was probably sent a letter and asked to make the examination. I do not now recall any of the details. I know they have never specified in any request what I was to look for.

Q. Then at the time you made your examination you did not have in mind the question of the possible cause of the condition you found in Mr. Lubinski's eye, is that right?

A. Well, it was a late date to look for cause. I reported the findings. [376]

Q. This examination took place when?

A. June 20, 1944.

Q. That was almost a year after the happening of the occurrence, is that right?

A. That is right.

Q. For that reason you felt you were unable to determine the cause?

A. It would be rather late to look for a cause, I should think. Had I been treating the patient I certainly would have gone to some lengths to find

(Testimony of Dr. James R. Morrow.)

the cause, but in an office examination we have very little means of determining cause.

Q. In other words, two things prevented you from really finding the cause of this. The first was the nature of your examination, you were not able to make the other physical examination by way of blood test and things of that nature which might determine the question of cause—that was one?

A. Sometimes it takes months to find a cause.

Q. Anyhow, you were not in a position to give this man that kind of examination, and did not?

A. I had no such intention.

Q. The second one was the date of the examination, compared to the date of the injury. It was so great that in your opinion there would be very little evidence of the causal connection?

A. That is right. I think the eye itself had gone beyond the place where it was active.

Q. In other words, the condition had become fixed? [377] A. That is right.

Q. Does that carry along with it the necessary changes in the cornea?

A. There were no changes in the cornea at that time.

Q. Isn't it true that a year after the alleged incident that any scars or changes in the cornea would have been covered up or changed?

A. Scars of the cornea are permanent.

Q. Do you give it to me as your professional opinion that scars of the cornea, no matter how minute, always remain after a long period?

(Testimony of Dr. James R. Morrow.)

A. There is always evidence of scar where there has once been a scar.

Q. Irrespective of the size or nature of the injury to the cornea?

A. No. All injuries do not leave scars.

Q. A very small piece of steel, with high force, may enter the eye and leave no evidence on the cornea, is that correct?

A. No, that is not correct. If a piece of steel perforates the cornea, there is evidence. It might not be easily seen, but it is there.

Q. Six months afterwards? A. Yes.

Q. A year later?

A. If you use a slit lamp you will see the scars.

Q. Even with a microscopic piece of steel?

A. I do not know if a microscopic piece of steel pierces the eye or not. I have never known one to.

Q. Will you answer the question. I asked you if in the event [378] it did pierce the eye, it would leave a scar.

A. If it was microscopic, there would not be any evidence.

Q. It depends on the size and nature of the trauma; that is correct, isn't it?

A. Microscopic evidence could not be seen by the naked eye.

Q. Doctor, you then did not look for the cause of this man's condition at that time you examined him. you are only giving your guess now as the result of notes that you took at that time?

A. I did not try to determine the cause.

(Testimony of Dr. James R. Morrow.)

Q. And iritis and iridocyclitis are produced by many things, both exogenous and endogenous in nature? That is correct, isn't it?

A. Severe external injuries, yes, sir.

Q. It is a very unusual condition, isn't it? I mean, you do not find it as the result of some illness or injury? It is not common in man?

A. On the other hand, it is common in man.

Q. It is common in eye injuries?

A. Not eye injuries. I beg your pardon. I thought you asked me if iritis was common.

Q. That is right.

A. It is more iritis. We treat it constantly.

Q. In treating iritis, you look for the causes?

A. Yes, sir.

Q. And in determining the cause, you use a process of elimination? A. Yes, sir.

Q. You go from the most obvious and keep checking them off and eliminating those until you find the one that might [379] be the cause?

A. Yes, sir.

The Court: Name some of the most common causes of iritis.

The Witness: Focal infections, such as infected teeth, infected tonsils, infected gall bladders, appendicitis, rheumatism, arthritis, acute syphilis, tuberculosis and other infectious diseases.

Q. Did you go into this man's history of his prior condition of health?

A. Not extensively.

Q. You asked him if he had syphilis?

(Testimony of Dr. James R. Morrow.)

A. I sent him to the laboratory to determine that.

Q. You went a step further, you had him examined? A. Yes.

Q. What was your finding?

A. Negative. The Wasserman was negative.

Q. That is the test you took? A. Yes.

Q. And you concluded there was no syphilis?

A. That would be my conclusion.

Q. Did you look at his teeth?

A. No, sir; I looked at his mouth. I had no X-rays.

Q. Did you find any evidence of infection in his mouth? A. No.

Q. At least, you had no complaint of any bad teeth? I am going to be fair with you. I want to know if you could find any cause of this condition as far as anything inside of Mr. Lubinski's system was concerned.

A. I didn't go into that in this examination, because it was not pertinent. [380]

Q. But as far as you knew, you had to assume that there was no cause there, because you found none, isn't that correct?

A. It is neither correct nor incorrect. I was just not required to and had no need to do it.

Q. Let us put it this way: you found no evidence of any systemic condition?

A. That is right. I didn't make a physical examination, other than as to the condition of the eye.

(Testimony of Dr. James R. Morrow.)

Q. As far as your examination and report was concerned, there was no endogenous cause for this condition, is that correct?

A. I didn't report any cause.

Q. Did you find any endogenous cause?

A. I didn't look for it.

Q. And then you don't know?

A. That is right.

Q. Now, Doctor, in examining a patient, you are compelled to rely largely upon his history, are you not?

A. We always take a history.

Q. And in other words, you take the objective symptoms, what the man tells you, and what you find?

A. That is right.

Q. Your subjective symptoms are important to rely upon?

A. Yes.

Q. Did you obtain from this man any subjective symptoms, or any endogenous condition?

A. No, sir. He said he was in perfect health.

Q. Did you have any reason to doubt that statement from looking at him? [381]

A. No, sir.

Q. Iritis just doesn't happen, there is always a cause for it?

A. I think so.

Q. It is not one of the things that sometimes unfortunately occur to you—there is some cause for it—and you have eliminated, haven't you, all the endogenous causes at least as far as your knowledge is concerned?

A. No, I have not: I haven't eliminated any cause, because I didn't go into that.

(Testimony of Dr. James R. Morrow.)

Q. You knew of no endogenous causes, is that correct? A. That is correct.

Q. And if you eliminate the endogenous causes, then the only thing remaining is the exogenous causes?

Mr. Franklin: He said he has not eliminated them.

Mr. Levinson: He said he found none.

Mr. Franklin: Yes, but he said he didn't eliminate them.

The Court: He said he didn't try to find any, as I understood him.

The Witness: That is correct. If I had been treating the man——

Mr. Levinson: I think I can develop it further. I thought he said he knew of none, and the man told him he was in perfect health, and as far as he could see, he was in perfect health. That is correct, isn't it?

The Witness: That is correct.

Q. (By Mr. Levinson): As a hypothetical question, if you eliminate the endogenous causes, it leaves only the [382] exogenous causes, that is right, isn't it—because iritis just doesn't happen.

A. I didn't say I eliminated any.

Q. Let us assume you eliminate them. Then you have only left the exogenous causes.

A. If you did eliminate everything endogenous, then you would have the exogenous, yes.

Q. There are various kinds of irritations to the eyeball caused by various chemicals, are there not,

(Testimony of Dr. James R. Morrow.)

that set up a different reaction to the eye, depending on the nature of the chemical?

Mr. Franklin: Referring to the external?

Mr. Levinson: Referring to the external, yes.

Mr. Franklin: Not the internal.

The Witness: I just do not quite understand the question.

Mr. Levinson: I will reframe it.

Q. (Mr. Levinson): The eye being covered by moist mucous membrane, when the membrane comes into contact with various types of gases it has a reaction depending upon the nature of the gas with which it comes in contact, is that correct?

A. Yes.

Q. In other words, they vary, depending on the type of gas?

A. The type and length of time of exposure.

Q. There are some types of smoke irritants which are very mild and have very little effect on the eye?

A. I don't know about that.

Q. You have some that have very little effect?

A. I have been in rooms filled with cigar smoke many times. [383]

Q. But the reaction of the eyeball to the fumes of ordinary wood smoke, and to the fumes from a picric acid container, or fluorine container would be considerably different?

A. I think so.

Q. In other words, the moisture in the eye, in combination with the fumes, sets up a chemical reaction that has a chemical effect upon the surface of the eye?

A. I think it is possible.

(Testimony of Dr. James R. Morrow.)

Q. And when any such reaction is set up, Nature begins to defend it immediately by causing an increased flow of tears? A. That is correct.

Q. And as long as that reaction continues, Nature continues to pour tears through the lacrimal glands, isn't that correct?

A. That is right.

Q. Wouldn't the fact that an eye watered or teared for several days after the explosion have any effect upon your conclusion that the explosion was very severe and affected the surface of the eye?

A. I should think if tears ran for several days it was evidence of an irritation, certainly.

Q. If Mr. Lubinski in this instance had tears for several days after this occurred, would that be more evidence that the occurrence was something more than a passing whiff of smoke?

A. I should think so.

Q. If following the irritation it was accompanied by some sort of swelling, conjunctivitis, swelling of the lids, would that be further evidence of the severity of the irritation? [384]

A. Well, we are dealing with two things. We are dealing with irritation and conjunctivitis. My understanding of conjunctivitis is that it is a bacterial irritation, in its ordinary sense.

Q. Let us say swelling of the eyelids; Nature put more blood there for a period of several days, or a week—call it swelling—that is further evidence of the severity of the irritation? A. Yes, sir.

Q. If, say, a month after that incident, and dur-

(Testimony of Dr. James R. Morrow.)

ing all this period of time, the eye was pain-
ing him, and the person began to have difficulty with
the eye, with the vision of it, would you say there
was any connection between the original injury and
the beginning of difficulty with vision?

A. What injury do you mean?

Q. The injury from the irritation by the smoke
bomb. A. With the iridocyclitis?

Q. I will have the question read, and if you need
any help——

(Question read.)

A. Well, it could be or it could not be.

Q. Eliminating anything that intervened, as far
as we know, would you say there was a casual con-
nection between that original incident and the be-
ginning of difficulty with vision?

A. It could be separate, entirely.

Q. If it was separate, would you look for some
other cause? A. Certainly.

Q. And if you found no other cause, what
would be your conclusion? [385]

A. Well, I wouldn't make any conclusion if I
didn't find any cause.

Q. Then would you still eliminate entirely the
original injury and say that had nothing to do
with it?

A. I think an injury of a month's duration
would be incapable of producing loss of vision.
That is, had the eye been clear in the meantime.

Q. Perhaps you misunderstood my hypothetical

(Testimony of Dr. James R. Morrow.)

question. I did not say loss of vision, I said beginning to have difficulty in a period of a month.

Mr. Long: As the result of iridocyclitis, or other causes?

Mr. Levinson: I am relating this entire section of my cross examination to particular instances.

The Court: If he understands, he may answer.

Mr. Levinson: I will reframe the question.

Q. (Mr. Levinson): If we had an original explosion causing a corrosive smoke, or something that caused the lacrimal glands to function for two or three days in a row—or four days—and if we had subsequent to that some swelling—edema, I think you call it—and if about a month after the original incident he began to have difficulty with his sight, in losing vision, would you say there was any causal connection between the original injury to which I referred and the beginning of loss of vision a month later?

A. It is hard to answer that “yes” or “no,” because difficulty with vision is another subject where you would have to look for cause. [386]

Q. People sometimes go blind in one eye and don’t know it? A. That is correct.

Q. But if a person developed the habit of walking unconsciously adjusting himself to one condition, going off to the left, that would indicate he had trouble with his right eye?

A. It could be of either eye.

Q. If there is some loss of vision?

(Testimony of Dr. James R. Morrow.)

Mr. Long: I thought counsel was indicating his loss of vision he is talking about is the result of iridocyclitis or iritis, or some other cause. There are many causes. If you are talking about iritis in relation to this patient, I have no objection whatever.

Mr. Levinson: I am not saying it was the result of iritis. I am developing this man's condition during this period of time, and I want this Doctor's opinion on it.

The Court: The objection is overruled. I would like to know if both sides agree that the witness who has just come into the court room, Mr. Tomlinson, may not be affected by the exclusion order?

Mr. Long: That is my understanding.

Mr. Levinson: I will so stipulate.

The Court: I want both sides to stipulate.

Mr. Levinson: The Libelant will so stipulate.

Mr. Long: And so do the respondents.

Q. (Mr. Levinson): Doctor, assuming that, say, in September, which is two months after the alleged injury, that Mr. Lubinski or any person was examined by a doctor, and then it was found that he had begun to develop a very severe [387] iritis and substantial loss of vision, and that prior to that date, and prior to July of 1943, he had never had any trouble with his eyes, and two months before that he had been examined for both eyes and it was found they were in good order, 20/20 in each eye; would you say, Doctor, there was any causal connection between the smoke and irritating fumes on

(Testimony of Dr. James R. Morrow.)

July 15, 1943 and the fact that he had the tears for three or four days, had the edema, had a little difficulty with his eye, and two or more months later it was discovered he had iritis, would you think there was any connection between them?

Mr. Long: Limiting it to July 15, 1943?

Mr. Levinson: Yes.

A. I would not say, because I have never seen it and never read of a case.

Q. What would be the cause of it?

A. I don't know.

Q. Assuming the man was in good health, you do not know?

A. The causes are many, and they are not always found.

Q. If I get your answer, you would not know what the cause was?

A. That is right, if I did not examine the patient or treat him.

Q. We are agreed that the causes are either exogenous or endogenous—there must be some cause? A. That is correct.

Q. You testified on direct examination that Mr. Lubinski did not give you any history of any second fire? A. That is correct. [388]

Q. Did you ask him about it?

A. I asked him about his history, but I had no way of asking him about a second fire, because I had no way of knowing there was a second fire.

Q. Did he seem to be cooperative?

A. Yes, sir; very cooperative.

(Testimony of Dr. James R. Morrow.)

Q. He answered freely every question you asked him?
A. That is right.

Q. What is the likelihood of any injury to his right eye, if this eye is not removed?

A. I would feel that in the future the eye should be removed.

Q. There is some danger?

A. That is right; sympathetic ophthalmia.

Q. You found nothing wrong with the right eye?

A. Except a small astigmatism.

Q. Which is a normal condition?

A. It is not normal, but it is present in most people.

Q. That is why we wear glasses?

A. That is right.

Q. A systemic condition, which is the cause of an iritis is usual throughout the body or some local point of infection in the body?

A. It is there if it is found.

Q. If it affects the eye doesn't it usually affect both eyes?

A. Not necessarily. It may or may not.

Q. Hasn't that been your common experience?

A. No. We see many more people with it in one eye than in two eyes, but if you follow that patient for a period of years, you will find it probably occurring in the other [389] eye at some time in his life, unless the cause it removed.

Q. If it is a very severe iritis, as the result of some systemic condition, wouldn't you expect to find the same condition in the other eye?

(Testimony of Dr. James R. Morrow.)

A. We do not always.

Q. What is the reason, a difference in the eyes?

A. No one knows.

Q. One eye may be a little stronger than the other, a little more resistant to the disease—that may be the answer?

A. I do not think anyone can explain why one eye suffers from the uveitis or iridocyclitis, and the other eye is unaffected at the same time.

Q. But it happens?

A. We have many patients that have it in one eye, and occasionally a patient with it in both eyes at once. But single affections are much more common than double.

Q. Would that also explain why a man exposed to fumes with both eyes only has an injury to one?

A. Your guess is as good as mine on that. I do not know.

Q. It is possible that you could have a corrosive injury to the eye, is it not, to the surface of the eye, by irritation from some gas, which would not leave a scar?

Mr. Franklin: That is objected to, if the Court please. That has been gone into.

The Court: I am going to allow him to ask the question.

A. I think corrosion would certainly leave a scar.

Q. Depending on the extent of it, would a mild corrosive leave a scar? [390]

A. Where you use the word "corrosive" I would insist that it would leave a scar.

(Testimony of Dr. James R. Morrow.)

Q. Suppose a very severe irritant?

A. An irritant might not leave a scar.

Q. The irritant at the same time would cause something on the surface of the cornea that would get inside?

A. Our eyes are subject to irritants constantly.

Q. That is right, and the fact that we keep on crying is because the irritant is still there?

A. Yes.

Q. You say this eye had a very severe uveitis, or very severe inflammation, the exodus had already covered the opening into the cornea?

A. Yes.

Q. It was your opinion that while you didn't know the cause you guessed it was from frequent attacks of iritis?

A. I do not think I said that.

Q. What did you say?

A. I said he had suffered from a severe iridocyclitis or uveitis, plastic iritis.

Q. My notes say something about frequent attacks.

A. I think it is an error, because I had no knowledge of him having had frequent attacks.

Q. You do not contend it was the result of frequent attacks?

A. No, sir.

Q. How long does it take an iritis to develop?

A. Overnight.

Q. It also may develop in two weeks?

A. I think iritis, truly speaking, is a very rapid thing, unless of a chronic type, with acute flare-ups, and then [391] subsides and then increases.

(Testimony of Dr. James R. Morrow.)

Q. A man may have iritis and it develops very rapidly, and he would not know it except for such things as tears or pain?

A. Well, they know it. They all hold their eyes shut and complain that they either put something in their eye—in other words, they go to the doctor because they have a physical discomfort. Many of them have pain above their brows.

Q. The only thing as far as the individual is concerned, he has physical discomfort to the eye?

A. He has a physical disability of the eye.

Q. Accompanied by discomfort?

A. That is right.

Q. And as you told me a while ago, he might lose a lot of sight and not know it?

A. That is right.

Q. The fact that he complains to a doctor is some evidence that he has trouble of some sort?

A. Yes.

Mr. Levinson: That is all.

Redirect Examination

By Mr. Franklin:

Q. Dr. Morrow, was the type of iritis or iridocyclitis that you found present on Mr. Lubinski's eye the rapid developing type or otherwise?

A. I couldn't answer that, because I didn't see him at the time of the development.

Q. Ordinarily, what is the usual period of development? [392]

A. The acute type, overnight.

(Testimony of Dr. James R. Morrow.)

Q. You say it stems from many systemic infections in the entire body?

A. I do not understand the question.

Q. Can it be caused by any focal infection in the body? A. That is true.

The Court: The answer is not responsive. Can it be?

The Witness: Yes, sir.

Q. Is it medically possible to determine the specific cause of each and every infection causing an iridocyclitis? A. No.

Q. From your examination of Mr. Lubinski's left eye, did you find any external evidence of damage to the left eye from irritants, corroding, or penetrating the left eyeball? A. No.

Mr. Franklin: That is all.

Mr. Levinson: That is all.

The Court: Dr. Morrow, there need be no doubt but from the standpoint of both of counsel and also the Court your testimony has been quite interesting.

The Witness: Thank you, sir.

The Court: And you may be excused.

(Witness excused)

Mr. Franklin: If your Honor please, we offer in evidence the medical chart which has been marked for identification as Respondents' Exhibit A-9. [393]

Mr. Levinson: I have no objection to that as illustrative of the Doctor's testimony.

The Court: It may be admitted.

(Medical chart received in evidence as Respondents' Exhibit A-9.)

Mr. Long: I was going to suggest that there was some considerable testimony about a diagram showing the layers of the cornea, and it might be offered in evidence.

The Court: Let it be marked.

Mr. Levinson: I have no objection to it.

The Court: Then it is admitted in evidence as Respondents' Exhibit A-10.

(Diagram by Dr. Morrow received in evidence as Respondents' Exhibit A-10.)

The Court: We will take a recess at this time.
(Recess)

M. W. TOMLINSON,

called as a witness on behalf of Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, please?

A. M. W. Tomlinson.

Q. Where do you live, sir?

A. Mercer Island.

Q. By whom are you employed?

A. United States Coast Guard. [394]

Q. In what capacity?

(Testimony of M. W. Tomlinson.)

A. Chief Deputy United States Shipping Commissioner.

Q. How long have you held that position?

A. As Chief Deputy for about four years.

Q. Has your office the supervision of and custody of the Shipping Articles of vessels paying off in your jurisdiction?

A. Yes, sir.

Q. Did you at my request bring with you the original Articles on the voyage of the SS "George Flavel" which began effective May 17, 1943 and terminated on or about October 1, 1943, at Seattle?

A. The Articles terminated September 28, 1943, at Seattle.

Q. You have the original Articles in your possession?

A. This copy is the same as the original. It is called a duplicate. There are two original copies, as a matter of fact.

Mr. Franklin: I will ask to have this document marked for identification.

The Court: It may be so marked.

(Copy of Shipping Articles marked for identification Respondents' Exhibit A-11.)

The Court: Where is that clause that relates to the relationship of each party to the voyage?

Mr. Franklin: It shows right there, if the Court please, that the War Shipping Administration is the owner, and that the Alaska Steamship Company is the General Agent. It appears right on the face of that exhibit.

(Testimony of M. W. Tomlinson.)

The Court: I do not see the words you speak of. [395]

Mr. Franklin: I will ask to have this proposed exhibit handed to the witness, please.

Q. (By Mr. Franklin): Mr. Tomlinson, handing you what has been marked Respondents' Exhibit A-11 for identification, will you state what that is?

A. This is a copy of the face of the shipping Articles of the SS "George Flavel", for the voyage which commenced at Seattle about May 17, 1943.

Q. Who prepared that?

A. It was prepared under my supervision.

Q. Have you certified as to it being a true and correct copy? A. Yes.

Q. Is it necessary in the performance of the work of the Shipping Commissioner that the original-duplicate Articles which you brought with you be retained in the exclusive custody of the Shipping Commissioner? A. It is.

The Court: Have you any copies of that paper, or any forms from which and with which you could make copies?

Q. Is Respondents' Exhibit 11-A for identification a true full and complete copy of the original page 1 of the Shipping Articles? A. It is.

The Court: Do you have to return that to your official files, or is it agreeable to let that remain in the files of the court?

The Witness: If the witness please, that is why we made it, to bring it up here and it may stay here.

(Testimony of M. W. Tomlinson.)

The Court: You may proceed. [396]

Q. What does that show with reference to who is the operator of the vessel "George Flavel" during the voyage in question?

A. In the box in the upper left-hand corner, under the heading "Operating Company on this voyage" the name is shown "War Shipping Administration", and in parentheses, "Owner" and below that "Alaska Steamship Company, Gen. Agent".

Mr. Franklin: That is all. Thank you.

Cross Examination

By Mr. Levinson:

Q. At the time the men sign on is anything said about the designation on top, to your knowledge?

A. It is not the practice to read that part of the agreement.

Q. As long as we have the original shipping Articles, do you have a record of Mr. Lubinski's pay-off there? A. I have.

Q. Will you read it, please?

A. Just the pay-off side?

Q. Yes, including withdrawals.

A. Mr. Lubinski was paid off at Seattle September 28, 1943.

Q. What were his total earnings at the end of the voyage?

A. 3 months and 6 days; total earnings, \$1357.44.

Q. That is three months' pay? A. Yes.

(Testimony of M. W. Tomlinson.)

Q. Did you bring with you the log book of that vessel? A. Yes, I have the log.

Q. Did you examine the log to determine if there was any [397] reference to any fire on the ship? A. I did.

Q. Is there any reference to any fire on the ship at all? A. No.

Q. That is the official log? A. Yes, sir.

Mr. Levinson: That is all.

Redirect Examination

By Mr. Franklin:

Q. Do you know when Mr. Lubinski signed the Articles? What do those records show as to when Mr. Lubinski signed the Articles?

A. When he joined the vessel?

Q. Yes; when he signed those Articles.

A. He signed the Articles at San Francisco June 24, 1943, effective as of the 23d.

Mr. Franklin: That is all.

Mr. Levinson: I have nothing further.

Mr. Franklin: We offer in evidence what has been marked Respondents' Exhibit A-11.

The Court: Is there any objection?

Mr. Levinson: I have no objection.

The Court: The exhibit may be admitted.

(Shipping Articles received in evidence as Respondents' Exhibit A-11.)

The Court: I wish counsel would take this exhibit A-11, Mr. Levinson and Mr. Franklin, and

(Testimony of M. W. Tomlinson.)

put a red mark on the margin opposite the clause that relates to the relationship to the voyage, or the respective responsibilities [398] of the parties for the voyage, and the liabilities and duties arising in connection therewith. I do not see a word there opposite that margin.

Mr. Levinson: That is what there is.

The Court: The court has the impression, as a means of comparison, that in one case tried before this court there was introduced in evidence, or there was brought to the attention of the Court in some manner appropriate to the case, the Articles, which contained the stipulation of the parties as to the relationship that each party had to the responsibilities effected by the contract. Isn't there some clause in here that says who shall be liable for what?

Mr. Levinson: No, your Honor.

The Court: Do both sides agree there is no stipulation on that point?

Mr. Long: I would like to look at it, your Honor.

The Court: Is there any statement in the contract as to what party will be liable for injuries to the crew, or injuries and damages to the vessel, or wages of the crew, or anything of that sort? Isn't it stated who is to pay the crews' wages?

Mr. Levinson: If I may give my opinion, it is because of the contract with the vessel——

The Court: In addition to the Articles, is there any other contract between the parties?

(Testimony of M. W. Tomlinson.)

Mr. Long: I think I know what your Honor has in mind.

The Court: All right.

Mr. Long: First, the Articles, Respondents' Exhibit [399] A-11, contain in the box, alongside which the red line has been placed, the words "War Shipping Administration Owner. Alaska Steamship Company. Gen. Agent." Then the body of the document reads, "It is agreed between the master and seamen, or mariners of the Steamship 'George Flavel' of which Charles Goodwin is at present master",—and then follows the various engagement articles. In other words, this is the agreement of employment between the master and the crew. Then your Honor will recall that under the General Agency Agreement which is now in evidence as Exhibit A-1, I believe——

The Court: Will you take that contract and mark in the margin the clauses which relate to the question of liability which is sought to be enforced in this action?

Mr. Long: Yes, your Honor. And then by reference, as I said, your Honor, to Respondents' Exhibit A-3——

The Court: What exhibit do you have in your hand?

Mr. Long: Respondents' Exhibit A-3, which has been admitted in evidence. It provides, among other things, under Article 3-A, as to who the master is employed by, and by whom the seamen

(Testimony of M. W. Tomlinson.)

are employed. A-3, subparagraph D, provides as follows:

“The General Agent shall procure the master of the vessels operated hereunder, subject to the approval of the United States. The master of the ship is agent and employee of the United States, and shall have and exercise full control [400] responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the master for engagement by him, the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices,” et cetera.

“The officers and members of the crew shall be subject only to the orders of the master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.”

There are other parts of this that I cannot readily turn to, but I believe that is what your Honor has in mind.

The Court: If you think in the General Agency contract there is a clause that concerns or respects the liability and the person who is responsible for the liability here asserted in this lawsuit, will you kindly mark in the margin such clause, and let opposing counsel have a chance to approve or dis-

(Testimony of M. W. Tomlinson.)

approve of your contention that that clause does bear upon the subject.

Mr. Long: I think the clause I read, which provides the master shall be an employee of the United States, and the seamen employed by the master, of course makes the seamen employees of the United States.

The Court: Isn't there in the Agency Agreement some statement about who will be responsible for the [401] employees, their wages and their safety?

Mr. Long: I think so, your Honor, but I have seen so many of these I would not want to answer your Honor's question without looking at it.

The Court: You will have a chance to look at it before your argument. The respondents may proceed with their case in chief.

Mr. Franklin: The next is the deposition of Dr. James C. Schumacher.

The Court: How many more depositions have you?

Mr. Franklin: I think this will be the last, if the court please.

Mr. Long: I have found the portion your Honor refers to, and with counsel's permission I will mark that with red. We need not do that right now.

The Court: There seems to be a file here called U. S. Public Health Service, attached here.

Mr. Franklin: That was introduced as part of that deposition, your Honor.

(Testimony of M. W. Tomlinson.)

The Court: The deposition of Dr. James C. Schumacher?

Mr. Franklin: Yes, your Honor.

The Court: You may proceed.

(Witness excused) [402]

Mr. Long: If your Honor please, this is the deposition of Dr. James C. Schumacher, taken on behalf of respondents at San Francisco, California, Thursday, October 26, 1944, before Emma L. Mac-Hugh, Notary Public. The Respondents were represented at the taking of the deposition by Mr. Edward R. Kay, and the Libelant by Mr. Albert Michelson. The first question appears upon line 25, upon page 2.

DR. JAMES C. SCHUMACHER

called as a witness on behalf of Respondents, being first duly sworn by the Notary Public, was examined and testified by Deposition as follows:

Direct Examination

Q. (Mr. Kay): Dr. Schumacher, state your full name and address, please?

A. James C. Schumacher. The address you want?

Q. Yes.

A. U. S. Marine Hospital, San Francisco, California.

(Deposition of Dr. James C. Schumacher.)

Q. How long have you been at the Marine Hospital, Doctor?

A. Two and one-quarter years, approximately, a few days, more or less.

Q. And were you on duty there at the time that libelant, Mr. Walter Lubinski, presented himself for observation and treatment?

A. I was.

Q. And when did he first report there?

A. May I refer to the record?

Q. Yes. (The witness examines record.)

Mr. Levinson: If your Honor please, at [403] this point I am going to raise an objection to the testimony of this doctor on the ground of privilege. The witness reported there for treatment. He was called by the Respondents, and the witness reported to this doctor for treatment.

The Court: The Libelant reported to this doctor for treatment?

Mr. Levinson: That is right.

Mr. Long: There is nothing yet, your Honor, to object to.

Mr. Levinson: I waited until it appeared before making my objection.

Mr. Long: The objection could not be proper in any event until the doctor is asked a question as to what he found as the result of his examination as a physician and surgeon. When we get to that point then it is proper to make the objection. Thus far it is not.

(Deposition of Dr. James C. Schumacher.)

The Court: Have you any objection to the last statement?

Mr. Levinson: That is probably right.

The Court: You may proceed.

A. He first reported October 16th, 1943.

Q. Pardon me, Doctor. A. Surely.

Q. You are appearing here pursuant to subpoena duces tecum that was served on you in this matter, is that right? A. That is right.

Q. With the entire record of treatment in connection with [404] this case? A. I am.

Mr. Michelson: Can I see the subpoena?

Mr. Kay: Yes. (Handing Mr. Michelson)

Mr. Michelson: Can I ask if that was secured on an order of Court, or do you know?

Mr. Kay: I am not aware of that, Mr. Michelson, I cannot say.

Mr. Michelson: Well, it was issued out of the United States District Court for the Western District of Washington.

Mr. Kay: Northern Division.

Mr. Michelson: In Admiralty. And the subpoena was served here.

Mr. Kay: That is correct.

Q. This is your regular station, is it not, Doctor? I mean you don't have occasion to go to Seattle?

A. No, this is my regular station, permanent station.

Q. Yes. Now, when did Lubinski first present himself to the Marine Hospital?

(Deposition of Dr. James C. Schumacher.)

A. On October 16th, 1943.

Q. And did you take a history from him at that time.

A. I took a short history at that time.

Q. And what was that?

Mr. Levinson: That is where I raised my objection, your Honor .

The Court: What was the history?—is that what is called for?

Mr. Levinson: Yes, your Honor. From there on I object. Clearly that was a privileged [405] communication.

The Court: Does it have to be shown that the question would be damaging to the Libelant's case?

Mr. Levinson: The question of damage or health is absolutely immaterial. It is a question of personal privilege.

The Court: I am asking the views of both sides on that point.

Mr. Levinson: That is my view.

Mr. Franklin: My view, if the Court please, is that if the communication was received as a basis for treating or diagnosing the patient it would be embraced within the scope of the privilege.

The Court: Which diagnosis was needed for the purpose of treating him?

Mr. Franklin: Yes. I think that is true.

Mr. Levinson: I renew my objection.

Mr. Long: I do not think the objection has been definitely stated, except as to the claim of privilege. There is a proper way to state it, and

(Deposition of Dr. James C. Schumacher.)

I presume counsel wishes to do it to make the record.

Mr. Levinson: On the basis that the witness called to testify occupied the position of physician to the Libelant, and the relation of patient and physician is established, which privilege can only be waived by the Libelant. [406]

The Court: And he does not waive it?

Mr. Levinson: He does not waive it. I claim it now. I have all my rights under the rules reserved to the time the deposition is read.

Mr. Long: Under the Statute of California the patient must claim it himself.

Mr. Levinson: We are not under the California law.

Mr. Long: That is where the relationship of patient and physician arose.

The Court: I do not think that we are trying this case according to the California law. We are not in California, and there is nothing that I know of that is applicable to California. If that is the counter objection it is overruled.

Mr. Long: It is my duty, inasmuch as it now appears that the relationship existed in California. I know counsel wishes to claim privilege, and I am trying to suggest the proper way to do it.

The Court: Very well. The claim of privilege is sustained.

Mr. Franklin: If the Court please, Respondents offer to prove by the testimony of Dr. Schumacher

(Deposition of Dr. James C. Schumacher.)

that if he were asked the following questions he would make thereto the following answers, and with the indulgence of the Court I want to read the [407] balance of the deposition.

The Court: All of it?

Mr. Franklin: Yes, your Honor, except the objections, and except the colloquy.

The Court: Do you feel that is necessary to properly preserve your record?

Mr. Franklin: Yes, your Honor.

The Court: All right. You will be given that opportunity.

Mr. Long: May I suggest, so that the Court may understand our situation, this physician is a public official, an officer of the United States Marine Hospital, an employee of the United States, the same as this man is.

The Court: Do you wish to show the Court some authority that you would like to call to your assistance in defense of your position?

Mr. Long: I think the question is still moot, and I think the weight of authority is according to your Honor's ruling at the present time. Nevertheless, we wish to make the record, to be frank about it.

The Court: I am sure counsel on both sides understand that I would like to have the benefit of any authority available on any important point, and any time counsel will let me know that they have some authority they would like to have the Court [408] consider I am always glad to welcome any such sug-

(Deposition of Dr. James C. Schumacher.)

gestion. You may proceed to make your record. The court will provide that time and opportunity at this time.

Q. And what was that?

Mr. Michelson: Just a minute. Is he testifying from his own memory or is he testifying from papers which I see he has on the desk before him?

Mr. Kay: Well, he is referring to those records. That is what you wish to do, is it, Doctor?

A. Yes.

Q. (Mr. Michelson): What are the records?

A. The record—there are two of them. One is the out-patient record, and his other is his record in the hospital.

Q. A clinical record? A. A clinical record.

Mr. Michelson: Well, inasmuch as the Doctor is not testifying from his own independent recollection and is apparently relying on the record, I will object to him being questioned regarding it, that the record is the best evidence of what it contains, and that it should be introduced in evidence.

Mr. Kay: Well, the record is going to be introduced in evidence, we intend to do that. And aside from that record, we have some other questions that we want to ask the Doctor. So you have made your objection, and we will proceed.

Mr. Michelson: Yes. It can be understood that all this testimony which he is now giving is from the [409] record, and that we object to it being given in that way, since he has no independent recollection.

(Deposition of Dr. James C. Schumacher.)

Mr. Kay: This particular question which I have asked and which he is answering is——

A. I can testify without the record, but I won't remember the dates accurately, that is the only thing.

Mr. Kay: All right.

Q. You have referred to the record and you say that was October 16th, 1943, is that right?

A. Yes.

Q. Well, aside from the record what is your recollection as to the history that he gave you?

A. Well, the history which I took was that some time in September, about, the patient was a little bit uncertain about it, but he said about September 7th, 1943, he was exposed to smoke and dust from the ship which caused an inflammation of his eye, his left eye.

Q. Did he give you any different history than that at any subsequent time?

A. I know that he gave a different history to the interne with regard to the date when he was admitted to the hospital.

The Court: I do not want to hear this testimony. Couldn't it be stipulated between counsel that it may be regarded that this deposition, all of these questions and answers, was offered and the objection to it was made on the basis previously stated, and the court sustained the objection?

Mr. Long: I think we will have to read it. [410] When this deposition was taken there was no claim of privilege made.

(Deposition of Dr. James C. Schumacher.)

The Court: I do not want to hear the testimony.

Mr. Long: I think we have to make our offer before your Honor. I do not know any other way to do it. Frankly, I do not. I realize it takes time.

The Court: I can imagine that some human mind might be influenced by hearing it.

Mr. Long: I know of no other way, if your Honor please, than to make the offer in open court, before the court, and I think that is the only way we can do it to preserve our record.

The Court: I do not think my own mind will be influenced, but there is another reason, and that is because it will take some time to hear it, and I do not want to go through the labor of it, since it is something that the court has already resolved not to consider in this case. But you may proceed, if you cannot agree upon it.

Mr. Long: I do not think that we can do it by stipulation or I would be glad to do it.

The Court: Very well. Proceed.

Q. (Mr. Kay): Well, how do you know that, Doctor?

A. I know from having looked at the record after he was admitted to the hospital. He was my patient and I had to read the record. [411]

Q. And what did you find?

Mr. Michelson: Just a minute. I object to it. The record itself is the best evidence.

Q. (Mr. Kay): Well, you say that he gave a different date after he first gave the history to the interne?

A. Yes, he did.

(Deposition of Dr. James C. Schumacher.)

Q. How do you know that?

A. I know it by reading the record.

Q. And does the record show that?

A. The record shows.

Mr. Michelson: Just a minute. I object to it. The record is the best evidence.

Q. (Mr. Kay): What different date did he give to the interne so far as the records are concerned?

Mr. Michelson: Just a minute. The same objection.

Mr. Kay: You can answer the question.

A. He said that some time in about the middle of August. I don't know the exact date that he gave in August, but I know he changed the date to some time in August.

Q. And is that indicated on that out-patient card?

Mr. Michelson: Mr. Kay, I don't want to raise the same objection. Anything that is in the record, I object to him being questioned on it.

Mr. Kay: It is understood that your objections will go to any questions of that nature. I mean they are reserved for the time of trial.

Q. Will you refer to that card, then, and indicate where the change was made?

Mr. Michelson: Just a minute. I object to it because that is not in evidence, and I haven't seen it, [412] either, for that matter.

Mr. Kay: Well, I will let you see it. (Handing Mr. Michelson.)

(Deposition of Dr. James C. Schumacher.)

Mr. Michelson: Thank you. (Examining document.)

Q. (Mr. Kay): You are referring here to—what card do you call this?

A. This is the out-patient record.

Q. Will you please read the history that is shown there, which I presume is in your handwriting, is it?

A. This is in my handwriting. This is the one I took.

Q. All right, if you will read that?

A. "Patient had iritis of the left eye about August, 1943." I will give you the original date. I am sorry. "Patient had iritis of the left eye about September 7th while in Alaska." This is the report. In parenthesis I have, "Report by Navy Doctor." Then a new sentence: "Patient never wore glasses, and he has no pain."

Q. Then that is in ink, is it, and I see that Sept. 7th has a line drawn through in pencil, and above that written in pencil "Aug. 1943." Was that put there by you?

A. No, I didn't put that there.

Q. And that was the matter that you were referring to that was changed by presumably the interne?

A. No. The history which the patient gave to the interne on the history sheet of the record is somewhat different as to dates.

Q. Oh. But that pencil correction there is not your handwriting?

A. No, that is not my handwriting.

(Deposition of Dr. James C. Schumacher.)

Q. Now, on this out-patient card is there a diagnosis [413] indicated? A. Yes, there is.

Q. What does that read?

A. "Chronic iridocyclitis of left eye."

Q. Was that your diagnosis, Doctor?

A. That was my diagnosis, yês, sir.

Q. Now, independently of that record there, do you recall making that diagnosis yourself?

A. Yes, I did.

Q. And how long was this patient under your care there, for what period or periods?

A. Let's see. By memory or by the chart?

Q. By your recollection or the chart?

A. Well, I will give you the exact dates from the chart.

Q. (Mr. Michelson): You are reading from the record, Doctor?

A. This is the exact date. He was under our care and observation from October 16th, 1943, until February 9th, 1944.

Q. (Mr. Kay): And did you generally see him most of the time?

A. Yes, I saw him all but twice during that time.

Q. And who else would see him other than you?

A. Dr. Faed in the clinic saw him twice when I wasn't there. I am sorry. Saw him once when I wasn't there. I saw him every other time. Dr. Percy Faed saw him once. I was apparently doing something else and did not get to see him.

Q. Well, there is another report here referred to as "Clinical record." (Handing Mr. Michelson.)

(Deposition of Dr. James C. Schumacher.)

Q. Under "Diagnosis" you have "Iritis chronic left eye." And this report is signed by you, is that correct? A. Yes. [414]

Q. Now, will you tell us what difference, if any, there is in the two terms, iritis and iridocyclitis?

A. Well, the term iridocyclitis implies a more widespread infection than iritis, but it is practically impossible to have one without the other.

Q. I see. Now, Doctor, what is your opinion as to whether exposure to smoke in July and again in August, 1943, that is, whether or not there is any relationship between the condition which you diagnosed and such exposures?

Mr. Michelson: Just a minute. I object to that upon the ground that I understand there is a regulation of the public—United States Public Health Service—prohibiting doctors in that Service from giving an opinion on a matter coming under their case. I would like to ask the doctor the question if he knows of such a regulation.

A. No, we are permitted to give testimony as long as we have the permission of the Commanding Officer, but we are supposedly—it is supposed to be expert testimony at that time.

Q. Did you secure the permission of the Commanding Officer?

A. Yes, I have his permission to be here.

Q. (Mr. Kay): Have you my question in mind, Doctor?

A. Will you please repeat it?

(Question read by the reporter.)

(Deposition of Dr. James C. Schumacher.)

A. In my opinion, there is no relationship between the exposure to the smoke and the condition for which I treated him.

Q. And will you explain why you have that opinion, Doctor?

A. Well, iritis or iridocyclitis is an inflammation of the deeper tissues of the eye, and there are a limited number of things which cause it. The most common cause is some endogenous toxin, either a toxin as such, or a toxin from [415] a disease, such as syphilis, tuberculosis, gonorrhea, or you can also get it from injuries; but the injuries which do cause it have to be of a very severe nature, either a penetrating type of injury, or a very severe contusion of the eye are about the only things which will cause it.

Q. Was there any history on the part of the patient, or from any other source that he had any such injuries which would be likely to cause or aggravate the condition of iritis or iridocyclitis?

A. From the history that the patient gave me there was none.

Q. Now, Doctor, there is a report in your records here under the heading of "Special Examination and Treatment Request, U. S. Naval Hospital," and it contains the signature of H. A. Kaven (M.C.) U.S.N. Where did you secure that report?

A. The patient brought that with him.

Q. The patient brought that with him. And what did he indicate that that was, or where he got it?

A. He told me that he got this from the Naval Officer who examined him in Alaska.

(Deposition of Dr. James C. Schumacher.)

Q. And would you read that into the record, the report?

Mr. Michelson: Well, I thought you said you were going to introduce these?

Mr. Kay: I am, but in the event there is some other objection I want the Doctor's testimony on it, anyway. I am going to ask him a question about this particular report.

Mr. Michelson: It is objected to that it is not the best evidence. This is not in evidence, and if he is going [416] to read it, it is not really his own testimony.

Mr. Kay: Yes, but I am going to ask him a question with reference to the description of the condition there. Will you read that, Doctor?

A. (Reading): "P.X. Left eye.
Tactile tension soft."

Then the next paragraph is:

"Cornea-keratitic deposits on
posterior cornea surface, lower
1/2. Iris appears muddy."

Then below that is another paragraph:

"R.X. 1% atropine sulphate
sol. Drops 1 tid."

Another paragraph:

"Hot compresses 20 min bid."

Q. What does "bid." mean?

A. That means twice a day.

(Deposition of Dr. James C. Schumacher.)

The Court: The court will now be adjourned until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until January 12, 1945, at the hour of 10:00 o'clock a.m.) [417]

January 12, 1945, 10:00 O'Clock A.M.

The Court: You may proceed with the case on trial.

Mr. Long: We will continue reading at line 9 on page 12.

Mr. Levinson: In order that the record may be clear, as I understand it this is still a continuation of the offer of proof.

Mr. Long: Of the offer of proof.

Mr. Levinson: The offer that was made yesterday.

The Court: That is my understanding.

Mr. Long: That is correct.

Mr. Levinson: It would appear to me, in the interests of the convenience of the court, as well as orderly procedure, that an offer of proof should be made in the form of an offer of proof, rather than simply reading the questions and answers in a deposition. It appears to me that counsel should be able to summarize what he expects his witness to prove, and make such an offer to your Honor, and at least put your Honor in a position to know whether it should be admitted, rather than having to pass upon

(Deposition of Dr. James C. Schumacher.)

so many collateral matters as appear in the taking of a deposition. I think in all fairness to your Honor an offer of proof in the form of an offer of proof should be made, and then your Honor could consider whether the offer should be accepted.

The Court: I think that is the way it is ordinarily done. I also think that in the interests of conserving the [418] time of counsel as well as the court it should be done in that form, if convenient to counsel.

Mr. Long: If the Court please, we are virtually through. I merely suggest that it would be necessary to possibly take the same time in formulating an offer of proof, chronologically, as it would to complete the reading of the deposition. We are at page 12 right now.

The Court: In view of that last statement I will approve your proceeding in that form, but I would suggest to both sides that in the future I wish you would try to conserve your time by making an offer of proof in summarized form.

Mr. Long: May I suggest that that portion of the deposition beginning on page 13 is not subject to the objection. I think it is proper testimony.

The Court: When you get to it will you call the attention of opposing counsel to it, and then there will be an opportunity given to both of you to consider it together?

Mr. Long: Yes, your Honor.

The Court: You may proceed.

(Continuing reading.)

(Deposition of Dr. James C. Schumacher.)

Q. This description that you have read of the condition of the eye, state whether or not that is a typical symptom of the condition which you eventually found?

A. The description which appears here is a typical description of iritis.

Q. Yes. A. Or iridocyclitis.

Q. And how about the treatment, is that standard treatment [419] that the Doctor indicated there for that type of condition?

A. The treatment indicated is standard for iritis or iridocyclitis.

Mr. Long: I think, if the Court please, the following testimony, beginning at line 19 on page 12, and concluding on page 14, line 23, is probably not objectionable as being privileged.

The Court: Are you prepared at this time to respond?

Mr. Levinson: I would suggest that he read it, your Honor, and then I can raise the question to the admission. It relates to the identification of the hospital records, which is in a different situation than the testimony of the doctor. I am frank to admit that.

Mr. Long: Those hospital records, if the Court please, the certificate of hospital out-patient treatment and the clinical record, have been admitted in evidence and are exhibits in this case.

Mr. Levinson: That is true.

Q. (Continuing reading): Now, I see in the rec-

(Deposition of Dr. James C. Schumacher.)

ord copies of Certificate of Hospital and Outpatient Treatment, and Abstract from Clinical Record, both indicating that the originals had been sent to the patient, is that correct?

Mr. Michelson: That is objected to as leading. If he sent it himself, of course—— [420]

Q. (By Mr. Kay): Will you state whether or not the Clinical Abstract and Certificate of Hospital and Out-patient Treatment were sent to the patient by you, or under your direction?

A. I cannot truthfully answer that. I mean I am not sure.

Mr. Levinson: Your Honor, I have never seen the records, and I wonder if I could see them. There was something more came with them, and I would like to make an examination.

The Court: Mr. Levinson, will you point them out? I do not know whether the clerk knows what you refer to.

Mr. Levinson: I have never seen it and I would like to look at it.

Mr. Long: For the purpose of identification in the record, I would like the record to show that counsel is now examining the entire hospital record of Mr. Walter Lubinski, in the United States Marine Hospital at San Francisco, while under the care of Dr. Schumacher, which Dr. schumacher refers to and which is made a part of the exhibit to the deposition of Dr. Schumacher. I want the record to show that counsel is now examining it.

(Deposition of Dr. James C. Schumacher.)

The Court: The statement just made by counsel is received in the record. (Counsel examines document.) You may proceed. Are you still reading that part which he is going [421] to be asked about, and in connection with a desire to offer it?

Mr. Levinson: I so understand.

Mr. Long: Yes. Reading, Mr. Levinson, at line 4, page 13.

Q. (Continuing reading): Are these documents I show you copies of Certificate of Hospital and Out-patient Treatment and Clinical Abstract? I see they are carbon copies.

A. Yes, they are copies. I just want to be sure. The out-patient discharge from the hospital, date of admission—Yes, this is the Clinical Abstract.

Q. Will you read what is stated above this Abstract and Clinical Record, please?

A. "Mailed to: Walter C. Lubinski, 1602 Northern Life Tower, Seattle, Washington."

Q. And above this Certificate of Hospital and Outpatient Treatment?

A. "Given to patient."

Mr. Kay: All right, I think that is all.

Examination by Mr. Michelson:

Q. (Mr. Michelson): Doctor, what is your age?

A. 34.

Q. Now, that Clinical Record, so-called, that is an abstract from the Clinical Record? A. Yes.

Q. That is an abstract from the Clinical Record itself, is it? A. Yes.

(Deposition of Dr. James C. Schumacher.)

Q. And it is only a very brief abstract from the record? A. Yes. [422]

Q. Who makes that up, do you know?

A. We have a girl who does nothing but that up there. We have a lot of them and she abstracts them, and it has to be O.K'd by the Commanding Officer.

Q. She isn't a doctor herself? A. No.

Q. And she just gets it from the record?

A. Yes, she is a medical secretary.

Q. A medical secretary. There are a great many of those gotten every day, aren't there?

A. Oh, five or six at least. That would be a guess.

Q. And, now, the Certificate of Outpatient—Hospital and Outpatient Treatment, that is made up by her, too? A. By her also.

Q. And you don't know whether those were sent out, or how they happen to be in that file, do you?

A. Yes, I know how they happen to be in the file. Those had to be O. K'd by—the Clinical—what we call the Insurance Form, which is a smaller Clinical Abstract has to be O. K'd by me. I have to read it over before it is turned over to the patient, or whomever he wants. But they bring it to my office. I O. K. it if the contents of it is correct. But the copies go—I can't swear to that.

Q. Now, Doctor, was Mr. Lubinski under your care from approximately October 16th, 1943, to February 9th, 1944? A. He was.

(Deposition of Dr. James C. Schumacher.)

Q. You treated him, did you?

A. I did, sir.

Mr. Levinson: I think thereafter begins [423] matter which might be objected to under the claim of privilege.

The Court: Is there any objection to receiving in evidence that part which counsel has just read, beginning at page 12, line 19, and continuing to page 14, line 24?

Mr. Levinson: I have none.

The Court: That part is now received in evidence.

Mr. Levinson: As a matter of fact, I do not believe that the following comes within my objection, either. It simply relates to treatment—if counsel wants it.

Mr. Long: If counsel waives his objection to that part, let us read it.

The Court: Very well.

Mr. Long: Then beginning at line 25 on page 14.

The Court: The following is now received in evidence.

Mr. Levinson: Very well.

(Continued reading)

Q. Did you tell him what to do about his eye, and what he should not do? A. Yes, sir.

Q. Do you remember what you told him?

A. Well, at the time he left the hospital I gave him atropine to use in his eye daily, told him he could use compresses on his eye, if he had the time

(Deposition of Dr. James C. Schumacher.)

it would be advisable; [424] and that is about all he could do by himself.

Q. But each day that he would come out there—

A. Each day he came out I treated the eye and told him what to do.

Q. And advised him? A. Yes, sir.

Q. And he consulted you about it?

A. Yes, sir.

Q. Asked you what to do. Now, regarding that change in lead pencil that you referred to, you didn't make that change, did you?

A. No, I did not.

Q. You were not present when it was made, were you? A. I was not.

Q. You were not present at any conversation on which that date was mentioned between Mr. Lubinski and another doctor, or other person who wrote that? A. No.

Q. So all you know is it is on the record?

A. All I know is that it has been changed, yes.

Mr. Michelson: That is all.

Mr. Long: The redirect examination, I do not think that is privileged, either.

Mr. Levinson: No.

The Court: You may proceed.

(Continuing reading)

Redirect Examination

Q. (Mr. Kay): Doctor, of what school are you a graduate? A. St. Louis University.

(Deposition of Dr. James C. Schumacher.)

Q. And besides your experience at the Marine Hospital, what [425] have you done?

A. Well, I graduated in 1936 and had an internship at the Marine Hospital in Baltimore for one year, was in general practice for a year, and then went to the Marine Hospital in New Orleans, where I was in the Eye Department for approximately three years.

Q. Are you specializing in the treatment of eye conditions, then? A. Yes.

Q. And you have been for some five years?

A. Yes, longer than that, even. Following that I was with the Professor of Ophthalmology at St. Louis University for one year, and then came out here to do eye work. They sent me out here for that purpose, to do the eye work.

The Court: That completes the part the court ordered received in evidence.

Mr. Franklin: May we make the record? That terminates at line 11 on page 16.

The Court: You may do so.

Mr. Levinson: The following few questions relate to the matter of privilege, on which objection I am still standing, and I assume counsel will want to read that as part of the offer of proof.

The Court: He may make his offer. The Court has sustained the objection to it heretofore.

Mr. Franklin: The Respondents offer to prove that if asked the following question, the witness would make the following answer: [426]

(Deposition of Dr. James C. Schumacher.)

Q. Assuming these exposures to smoke caused some inflammation of the eyelids and irritation of the eyes, as smoke would state whether in your opinion that exposure and those resulting conditions caused or aggravated the present condition of iridocyclitis?

A. Well, the inflammation of the lids or the irritation of the eye caused by the smoke, in my opinion, would not cause the iritis or the iridocyclitis or aggravate the condition that was present before.

Mr. Franklin: The next matter, if the Court please, is not objectionable. That is line 23 to line 25, on page 16.

The Court: Have you any objection to that, Mr. Levinson?

Mr. Levinson: I have none, your Honor.

The Court: That matter is now received in evidence, and you may read it.

(Continuing reading).

Recross Examination

Q. (Mr. Michelson) In what State were you licensed to practice?

A. I was licensed to practice in Missouri and also Texas, and I am licensed to practice in California.

Mr. Michelson: That is all.

Mr. Franklin: Then lines 1 to 5, on page 17, I think are not privileged.

Mr. Levinson: I agree with that.

The Court: They are received in evidence.

(Continuing reading)

(Deposition of Dr. James C. Schumacher.)

Mr. Kay: Now, Doctor, we are going to offer this [427] Clinical Record in evidence, and we will ask the Court it be withdrawn when this case is terminated. Is that all right?

A. That is all right. You can have it just as long as you want providing I have a receipt.

Mr. Levinson: Is that the offer now, Counsel, for the record?

Mr. Long. We are now offering the Clinical Record.

The Court: Has it been marked?

Mr. Franklin: No, if the Court please.

The Court: Have you any suggestion as to a proper mark or number?

Mr. Franklin: I think our next number is Respondents' Exhibit A-12.

The Court: It may be marked for identification as Respondents' Exhibit A-12.

(Document marked for identification Respondents' Exhibit A-12.)

Do you wish to include in that marked exhibit this sheet which was taken out of the exhibit previously?

Mr. Franklin: Yes, your Honor. I want to subsequently offer that as a separate exhibit.

The Court: I had understood that you wanted it included in this exhibit.

Mr. Franklin: No, your Honor: I want to withdraw that from the abstract and make a separate exhibit of it.

The Court: Do you now offer Respondents' Exhibit A-12?

Mr. Franklin: Yes, if the Court please. [428]

Mr. Levinson: I have no objection.

The Court: It may be admitted.

(Document received in evidence as Respondents' Exhibit A-12.)

Now do you wish to mark that sheet of paper which was taken out of it?

Mr. Franklin: Yes, your Honor, as Respondents' Exhibit A-13 for identification.

The Court: Let it be so marked.

(Document marked for identification Respondents' Exhibit A-13.)

Mr. Franklin: Mr. Levinson, there is no dispute that Respondents' Exhibit for identification A-13 was signed under oath by Mr. Lubinski?

Mr. Levinson: It appears on the face of it.

Mr. Franklin: And that that application was made by Mr. Lubinski for the purpose of procuring an abstract from the clinical record which has heretofore been introduced in evidence?

Mr. Levinson: That is right.

Mr. Franklin: If the Court please, we offer in evidence at this time Respondents' Exhibit A-13 for identification.

Mr. Levinson: I do not see it materiality. It is simply an application for an abstract of the record.

Mr. Franklin: It shows the circumstances and explains the mechanism whereby an abstract is obtained.

Mr. Levinson: I do not see its materiality.

The Court: The objection is overruled. Respondents' Exhibit A-13 is now admitted. [429]

(Document received in evidence as Respondents' Exhibit A-13.)

RESPONDENTS' EXHIBIT A-13

Sent to U. S. Marine Hospital, Seattle by error.

APPLICATION FOR ABSTRACT FROM CLINICAL RECORD

3-13-44

Miss Kenney

Feb. 29, 1943

Medical Officer in Charge,
U. S. Public Health Service

.....
San Francisco, Calif.

Sir:

Please forward to me at the address given below, an abstract from the clinical record of my case while I was a patient of the U. S. Public Health Service at the U. S. Marine Hospital, San Francisco, Calif., on account of disability which occurred while I was employed on the S. S. George Flavel, which vessel is operated by Alaska S S Co.

I was admitted for treatment Oct. 18, 1943 and was discharged O. P. Feb. 15 1944.

The purpose for which I desire the information is as follows: Adjustment of Claim for Compensation.

Respectfully,

W. C. LUBINSKI

(Signature of applicant)

1602 Northern Life Tower, Seattle, Wash.

Subscribed and sworn to before me this 29 day of Feb., 1944.

[Seal] SAM L. LEVINSON

(Signature of Notary Public)

Note: The applicant is notified that to avoid partisanship, the United States may, upon receipt of proper application, furnish the foregoing information to any party in interest, whether such information is desired for the purpose of litigation or otherwise.

Mr. Franklin: If the Court please, I would like to make my argument as to the fact that the privilege in this case has been waived.

The Court: You may proceed with that at this time in connection with your offer of all of the parts of Dr. Schumacher's deposition which have not already been admitted in evidence and received as a part of the Respondents' case by the court.

Mr. Franklin: If the Court please, the right of a patient to seal the lips of his attending physician

is not a common law right. It is a statutory right. It is a right that has been much discredited in recent years. It is a right that can be waived by any disclosure of any of the information which has been obtained by virtue of the physician-patient relationship, because when the patient discloses any portion of the treatment or disease for which a physician treated him he thereby waives the privilege, because the reason for the privilege, which is incident upon the necessity of a patient having the utmost confidence in his physician, and such revelations as he may make to him for the purpose of effecting a cure, no longer hold.

So that the law is well settled, if the court please, that if there is a waiver or a communication in the presence of third parties of any contents of any information which a physician has gained by virtue of that relationship, there exists a waiver.

In this case it is quite apparent, if the court [430] please, that there has been a waiver of the testimony of Dr. Schumacher.

If your Honor will refer to Respondents' Exhibit A-13, which has just been introduced in evidence, you will observe on the lower portion of that exhibit, if the Court please, a statement thereon—in the extreme lower portion of that affidavit, in the lower left-hand margin—you will observe that there is a statement advising Mr. Lubinski, in this case the patient, that when he made that application for that abstract of clinical record that information would be divulged to all interested parties. I think

that is a fair summation of that statement at the bottom of the record.

So that when Mr. Lubinski applied for that abstract he waived his privilege. Not only did he waive his privilege by applying for the abstract itself, and being forewarned of what his application would entail as to disclosure, but when he comes into court and offers in evidence Libelant's Exhibit No. 1, an abstract of clinical record of his treatment and his disease, and his condition, that amounts to a further waiver and disclosure of the information obtained by Dr. Schumacher, the attending physician.

So we have here, if the court please, a waiver of the information by the Libelant, by specifically introducing in evidence the results of the treatment, and the opinion of the attending physician as to the disease and ailment from which he is suffering.

We have a further waiver, if the Court please, by reason of respondents' Exhibit A-2, which was admitted [431] by counsel to have been furnished by Mr. Lubinski to Mr. John Black, who was conducting certain negotiations in this matter prior to the institution of this lawsuit. There we have a second instance where the information was disclosed.

The Court: May I see Respondents' Exhibit A-2?

Mr. Franklin: Yes, your Honor, and here is Libelant's Exhibit 1. Your Honor will recall the unobjected to testimony of Dr. Schumacher that he personally checked those records to make sure that the information was accurate, and the history

and diagnosis and treatment recorded in those two exhibits was correct.

The Court: What is there on Respondents' Exhibit A-2 that you think is a waiver of the privilege?

Mr. Franklin: The history is a waiver of the privilege. "The patient states he had iritis of the left eye about August, 1943, while in Alaska." Diagnosis is a waiver of the privilege.

The Court: How can you say that when he might not have been willing to tell me or you that, but he claims he was willing to tell Dr. Schumacher that?

Mr. Franklin: Yes, your Honor, but our position is that this information has been disclosed to third parties and, therefore, the privilege is waived.

The Court: Who, and under what circumstances?

Mr. Franklin: First, by applying for the abstract of clinical record, which indicated a knowledge on his part that he would thereby waive that privilege by disclosing this information to interested parties, other than himself. That was the first step.

The Court: Have you a case on that?

Mr. Franklin: I have no case, your Honor. It shows it right on the abstract.

The Court: What is your motion with respect to these two instruments, Exhibits 1 and 2? What is it you are asking for? What is your application?

Mr. Franklin: I am contending, if the Court please—

The Court: No; I want to know specifically what you are asking the Court to do.

Mr. Franklin: I ask the Court to admit in evi-

lence that portion of the deposition of Dr. Schumacher which your Honor has read in our offer of proof, for the reason that the privilege has been waived in this case.

Mr. Levinson: Before your Honor rules on it, perhaps this might help us——

The Court: Do you have any objection to the request?

Mr. Levinson: I think that this will answer your Honor's question. There has been a serious question in my mind this morning as to the so-called waiver, and because of the way it was presented to the Court, actually read to the Court, I withdraw my objection on the waiver.

The Court: Very well. The application is granted. Now is there anything that you ask the Court to do in this connection that has not yet been done, or in respect to which the court has not made a ruling?

Mr. Long: I think not, your Honor. It is my understanding, if I may state it in the record, that there are other procedural matters to be considered.

The Court: Respondents' Exhibit A-13 has been [433] received in evidence, and Respondents' Exhibit A-2 you now have. That is already received in evidence. Now do you think of anything else that has not been ruled upon?

Mr. Long: No, your Honor, but I want to be certain the record is clear. It appears from the record that the claim of privilege in connection with all of the testimony of Dr. Schumacher has now been waived.

Mr. Levinson: That is correct.

Mr. Long: And the Court may consider it as evidence in this case.

Mr. Levinson: Yes.

The Court: And the Court does now receive in evidence as part of the Respondents' case in chief all of the deposition of Dr. James C. Schumacher.

Mr. Long: I think as a procedural matter, your Honor, so that the record may be clear, it is probably encumbent upon us to read a portion again to your Honor of Dr. Schumacher's testimony.

The Court: You may do so if you wish.

Mr. Long: I do not like to take the time, but I want to be clear about that.

The Court: You may do so if you wish.

Mr. Long: It is a technical part of our procedure.

The Court: I want to say, gentlemen, that I am going to suspend the trial of this case at noon. I have so many things to do that I will suspend the case on trial of this and all other cases at noon.

Mr. Long: May I speak to counsel off the record?

The Court: You may do so. [434]

(Discussion off the record.)

Mr. Long: We will be through in a matter of a few minutes, your Honor. As long as this testimony of Dr. Schumacher is concluded I feel that we should, in the proper procedure, read the testimony to your Honor, that portion to which objection has been withdrawn.

The Court: The Court has no disposition to disagree with counsel's judgment in the matter, or

make any unfavorable comments to counsel's contention. I just wish at this time to remind counsel on both sides of the court's limitation of time.

Mr. Long: Mr. Franklin says this is our last witness.

Mr. Franklin: At page 2, line 5.

Mr. Long: Part of this has been introduced without objection. My recollection is that to line 14, page 5, everything went in without objection.

Mr. Franklin: Yes; that is right.

Mr. Long: If that can be agreed, with the permission of the Court.

The Court: That is approved by the Court.

Mr. Long: Page 5 line 18.

DR. JAMES C. SCHUMACHER

(Continued reading of deposition)

Q. (Mr. Kay): You have referred to the record and you say that was October 16th, 1943, is that right? A. Yes.

Q. Well, aside from the record what is your recollection as to the history that he gave you? [435]

A. Well, the history which I took was that sometime in September, about, the patient was a little bit uncertain about it, but he said about September 7th, 1943, he was exposed to smoke and dust from the ship which caused an inflammation of his eye, his left eye.

Q. Did he give you any different history than that at any subsequent time?

(Deposition of Dr. James C. Schumacher.)

A. I know that he gave a different history to the interne with regard to the date when he was admitted to the hospital.

Mr. Michelson: I object unless he testifies what he himself knows.

Q. (Mr. Kay): Well, how do you know that, Doctor?

A. I know from having looked at the record after he was admitted to the hospital. He was my patient and I had to read the record.

Q. And what did you find?

Mr. Michelson: Just a minute. I object to it. The record itself is the best evidence.

Q. (Mr. Kay): Well, you say that he gave a different date after he first gave the history to the interne? A. Yes, he did.

Q. How do you know that?

A. I know it by reading the record.

Q. And does the record show that?

A. The record shows.

Mr. Michelson: Just a minute. I object to it. The record is the best evidence.

Q. (Mr. Kay): What different date did he give to the interne so far as the records are concerned? [436]

Mr. Michelson: Just a minute. The same objection.

Mr. Kay: You can answer the question.

A. He said that sometime in about the middle of August. I don't know the exact date that he gave

(Deposition of Dr. James C. Schumacher.)

in August, but I know he changed the date to some-time in August.

Q. And is that indicated on that out-patient card?

Mr. Michelson: Mr. Kay, I don't want to raise the same objection. Anything that is in the record, I object to him being questioned on it.

Mr. Kay: It is understood that your objections will go to any questions of that nature. I mean they are reserved for the time of trial.

Q. Will you refer to that card, then, and indicate where the change was made?

Mr. Franklin: The next is line 17.

Q. What card do you call this?

A. This is the out-patient record.

Q. Will you please read the history that is shown there, which I presume is in your handwriting, is it?

A. This is my handwriting. This is the one I took.

Q. All right, if you will read that?

A. "Patient had iritis of the left eye about August, 1943." I will give you the original date. I am sorry. "Patient had iritis of the left eye about September 7th while in Alaska." This is the report. In parenthesis I have "Report by Navy Doctor." Then a new sentence: "Patient never wore glasses, and he has no pain."

Q. Then that is in ink, is it, and I see that Sept. 7th has a line drawn through in pencil, and above that written [437] in pencil "Aug. 1943." Was that put there by you?

(Deposition of Dr. James C. Schumacher.)

A. No, I didn't put that there.

Q. And that was the matter that you were referring to that was changed by presumably the interne?

A. No. The history which the patient gave to the interne on the history sheet of the record is somewhat different as to dates.

Q. Oh. But that pencil correction there is not your handwriting?

A. No, that is not my handwriting.

Q. Now, on this out-patient card is there a diagnosis indicated? A. Yes, there is.

Q. What does that read?

A. "Chronic iridocyclitis of left eye."

Q. Was that your diagnosis, Doctor?

A. That was my diagnosis, yes, sir.

Q. Now, independently of that record there, do you recall making that diagnosis yourself?

A. Yes, I did.

Q. And how long was this patient under your care there, for what period or periods?

A. Let's see. By memory or by the chart?

Q. By your recollection or the chart?

A. Well, I will give you the exact dates from the chart.

Q. (By Mr. Michelson): You are reading from the record, Doctor?

A. This is the exact date. He was under our care and observation from October 16th, 1943, until February 9th, 1944. [438]

(Deposition of Dr. James C. Schumacher.)

Q. (Mr. Kay): And did you generally see him most of the time?

A. Yes, I saw him all but twice during that time.

Q. And who else would see him other than you?

A. Dr. Faed in the clinic saw him twice when I wasn't there. I am sorry. Saw him once when I wasn't there. I saw him every other time. Dr. Percy Faed saw him once. I apparently was doing something else and did not get to see him.

Q. Well, there is another report here referred to as "Clinical record." (Handing Mr. Michelson.)

Q. Under "Diagnosis" you have "Iritis chronic left eye." And this report is signed by you, is that correct? A. Yes.

Q. Now, will you tell us what difference, if any, there is in the two terms, iritis and iridocyclitis?

A. Well, the term iridocyclitis implies a more widespread infection than iritis, but it is practically impossible to have one without the other.

Q. I see. Now, Doctor, what is your opinion as to whether exposure to smoke in July and again in August, 1943, that is, whether or not there is any relationship between the condition which you diagnosed and such exposures?

Mr. Levinson: I object to that, if the Court please. The hypothetical question does not include all of the elements involved.

The Court: Doesn't it involve the same situation exactly as that ruled upon yesterday adversely to your contention?

(Deposition of Dr. James C. Schumacher.)

Mr. Levinson: Yes.

The Court: This Doctor received this [439] party to the action now before the Court as a patient, and he examined him for the purpose of treating his disease?

Mr. Levinson: That is right.

The Court: Or his ailment.

Mr. Levinson: Yes. The same objection. The same facts are involved.

The Court: The objection is overruled.

(Continuing reading.)

Mr. Michelson: * * * I would like to ask the doctor the question if he knows of such a regulation.

A. No, we are permitted to give testimony as long as we have the permission of the Commanding Officer, but we are supposedly—it is supposed to be expert testimony at that time.

Q. Did you secure the permission of the Commanding Officer?

A. Yes, I have his permission to be here.

Q. (Mr. Kay): Have you my question in mind, Doctor? A. Will you please repeat it?

(Question read by the Reporter.)

A. In my opinion, there is no relationship between the exposure to the smoke and the condition for which I treated him.

Q. And will you explain why you have that opinion, Doctor?

A. Well, iritis or iridocyclitis is an inflammation of the deeper tissues of the eye, and there are a lim-

(Deposition of Dr. James C. Schumacher.)

ited number of things which cause it. The most common cause is some endogenous toxin, either a toxin as such, or a toxin from a disease, such as syphilis, tuberculosis, gonorrhea, or you can also get it from injuries; but the injuries which [440] do cause it have to be of a very severe nature, either a penetrating type of injury, or a very severe contusion of the eye are about the only things which will cause it.

Q. Was there any history on the part of the patient, or from any other source that he had any such injuries which would be likely to cause or aggravate the condition of iritis or iridocyclitis?

A. From the history that the patient gave me there was none.

Q. Now, Doctor, there is a report in your records here under the heading of "Special Examination and Treatment Request, U. S. Naval Hospital," and it contains the signature of H. A. Kaven (M.C.) U.S.N. Where did you secure that report?

A. The patient brought that with him.

Q. The patient brought that with him. And what did he indicate that that was, or where he got it?

A. He told me that he got this from the Naval Officer who examined him in Alaska.

Q. And would you read that into the record, the report?

* * * *

A. (Reading) "P.X. Left eye. Tactile tension soft."

Then the next paragraph is:

(Deposition of Dr. James C. Schumacher.)

“Cornea-keratitic deposits on posterior cornea surface, lower $1\frac{1}{2}$. Iris appears muddy.”

Then below that is another paragraph:

“R.X. 1% atropine sulphate sol. Drops 1 tid.”

Another paragraph:

“Hot compresses 20 min bid.”

Q. What does “bid.” mean?

A. That means twice a day. [441]

Q. This description that you have read of the condition of the eye, state whether or not that is a typical symptom of the condition which you eventually found?

A. The description which appears here is a typical description of iritis.

Q. Yes. A. Or iridocyclitis.

Q. And how about the treatment, is that standard treatment that the Doctor indicated there for that type of condition?

A. The treatment indicated is standard for iritis or iridocyclitis.

The next part is already in evidence.

Mr. Franklin: I think the next matter omitted, and the only other matter appears at page 16, lines 12 to 20.

Mr. Long: Page 16 of the deposition, line 12.

Q. Assuming these exposures to smoke caused some inflammation of the eyelids and irritation of the eyes, as smoke would, state whether in your opinion that exposure and those resulting conditions caused or aggravated the present condition of iridocyclitis?

(Deposition of Dr. James C. Schumacher.)

A. Well, the inflammation of the lids or the irritation of the eye caused by the smoke, in my opinion, would not cause the iritis or the iridocyclitis or aggravate the condition that was present before.

Mr. Long: I think that concludes the entire reading of the deposition, your Honor, of Dr. James C. Schumacher, and it [442] is agreed, I think, by counsel, with the permission of the Court, that if we overlooked any particular remark or sentence it may be all included, and we therefore now offer in evidence the deposition of Dr. James C. Schumacher in its entirety.

The Court: There being no objection, the same is now received in evidence as part of the Respondents' case in chief.

I will say to counsel that if you think by reason of the circumstances under which part of this deposition was read in the form of an offer of proof, in the first instance, that that circumstance would justify you in calling to the court's mind any special part of it, the court encourages you in your desire to do so, if you should have such a desire. I do not mean at this moment.

Mr. Long: I understand, your Honor.

(Deposition Concluded.)

The Court: In that connection, there is some possibility that the Court may—I do not know yet what the attitude of the Court will be, but it will be stated later—it is possible that the Court will prefer to hear argument on this case after my return from San Francisco. That is one reason why I made the previous statement.

Mr. Long: If your Honor please, in the interests of clarity in the record, inasmuch as there has been admitted as an exhibit the clinical abstract or hospital [443] record as an exhibit, I should like to mark this deposition as an exhibit and offer it as such, because of the fact that there was some confusion in connection with the offer of proof, and I do not want any part of it omitted from any part of the reporter's transcript of the testimony.

Mr. Levinson: May I be heard on that?

The Court: Yes.

Mr. Levinson: I think that is highly improper. It has been read twice already to your Honor, and that is the only deposition that is offered as an exhibit as such.

There can be no confusion in the record, because the only confusion would relate to the objection as to privilege, and that has been withdrawn. So I see absolutely no reason why we should further clutter this record with this one deposition as an exhibit. It has been received in evidence, the document referred to in the deposition, the clinical record has already been received, which has been true of a number of other exhibits identified in depositions, for instance, the pictures.

The Court: I will say for the information of all counsel that my attitude is that the point raised by this motion involves only a hair-splitting proposition. Counsel for these respondents have in a recent proceeding made the point that is here involved by having the deposition admitted as an ex-

hibit in the case. I assume that he thought by doing so that the form of the evidence would be a little more convenient to the court, the trial court [444] or the appellate court, if the appellate court should review the matter.

It had never occurred to me before that anybody might think that I could not, while considering this case on the facts as well as the law, in order to come to a decision—that I would be denied access to the deposition.

Mr. Levinson: No.

The Court: It never occurred to me that anybody would suppose that the trial judge would be denied access to the deposition. I will tell you frankly that if I have occasion to want to review all of this evidence that I expect to go to the files of the clerk and read this deposition again.

Mr. Long: I understand that, your Honor. I want to make my position clear, because there is a decision in our Circuit Court which leaves the matter very much muddled. A case arose in San Francisco where the procedure was followed of simply reading a deposition, as is frequently done, and not marking it as an exhibit, and the Circuit Court took occasion to criticize that procedure. They did not refuse to review the evidence, but they said it might be marked as an exhibit, and then the exhibit comes before them.

The Court: I will take counsel's word for the fact that there may have been some implied preference expressed on behalf of the Appellate Court on that occasion. Just out of precaution I will grant

the motion, but I will say it will not affect this court one way or the other. [445]

Mr. Long: I realize that, your Honor, but I do not really know what the proper practice is, your Honor.

The Court: Here is the original copy. Is that the one you want marked?

Mr. Long: If you please.

The Court: Let it be marked as Respondents' Exhibit A-14. It has the clerk's filing mark on it. Let the record show that it is admitted in evidence.

(Deposition of Dr. James C. Schumacher received in evidence as Respondents' Exhibit A-14.)

Is there anything else?

Mr. Franklin: The Respondents rest, if the Court please.

The Court: The Respondents rest. The Libelant may proceed.

Mr. Levinson: Your Honor, as part of the case in chief of the Respondents—or at least I was served a notice—either a notice or it was by stipulation—the deposition of Captain Paul Zeigler, a Doctor on board the vessel, was taken by Respondents on June 5, 1944, and I, of course, have not introduced it as part of my case in chief because it was taken as a deposition of the Respondents, and I had no way of knowing whether the Respondents would introduce that deposition or not. They did not see fit to do so, so therefore I would like leave to introduce that deposition on rebuttal, even though

part of it may really relate to the Libelant's case in chief.

It was a deposition taken by respondents, and I did not know until now whether they would introduce it, [446] although I assumed they would. They read every deposition except two taken in San Francisco, which didn't amount to anything.

The Court: Do you wish to offer that as part of the Libelant's case?

Mr. Levinson: As part of the Libelant's case, yes, your Honor.

The Court: Is there any objection?

Mr. Franklin: No objection, your Honor.

The Court: As part of your case in chief, Mr. Levinson?

Mr. Long: Let us offer it as part of the case in chief. It doesn't make any difference, your Honor.

I would not say the case should be opened for its introduction. The Court will realize that this witness was called by the Respondents. I do not know whether it is proper to give it any designation as either evidence for the Respondents or the Libelant, although I am frank to say that the record may show that I am making the motion to introduce it.

The Court: In your case in chief?

Mr. Levinson: Yes.

The Court: That motion is granted, and the Libelant's case in chief is opened up for that purpose.

Mr. Long: The record may show that we have no objection.

The Court: Let the record so show. [447]

PAUL ZEIGLER,

called as a witness by Deposition on behalf of Respondents, the deposition being read in evidence on behalf of Libellant, as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, please?

A. My name is Capt. Paul Zeigler, Medical Corps, United States Army.

Q. Captain Zeigler, how long have you held a commission in the United States Army Medical Corps? A. Two years this last April.

Q. Captain Zeigler, what medical school did you graduate from? A. Oklahoma University.

Q. Approximately when?

A. I finished medical school in 1934.

Q. Would you please sketch your professional career following graduation?

A. After graduation at Oklahoma University in 1934 I took a year of rotating internship at Fresno County General Hospital. After that I returned to Texas and practiced general medicine and surgery in association with my brother and father until I came into the Army two years ago.

Mr. Levinson: That would be 1936 to 1942, approximately? A. 1942.

Q. Captain Zeigler, during the year 1943, particularly referring to the months of July, August and September, [448] 1943, to what vessel were you attached?

(Deposition of Paul Zeigler.)

A. Do you want me to tell you what I was attached to before I went on this particular ship?

Q. No.

A. In the latter part of June, 1943, I was attached to the SS George Flavel, an Army transport, and sailed on its first voyage from San Francisco.

Q. Were you the transport surgeon aboard the vessel? A. I was the transport surgeon.

Q. Are you still holding that post?

A. I am, yes, sir; general transport surgeon of the ship.

Q. You are leaving on the George Flavel in the near future to be gone for an indefinite period of time?

A. I guess you would say that. It is on military affairs. As far as I know I will leave in the near future on the Flavel for another trip.

Q. You do not know whether you will be here at the time this case may come on for trial?

A. I do not know where the ship goes or anything.

Q. While you were aboard the George Flavel did you have occasion to treat a Mr. Walter Lubinski, the boatswain on the vessel? A. I did.

Q. Would you tell us approximately when you first treated him?

A. Since the treatment of this man has been the length of time ago that it has been I am not so sure about my dates of treatment of this man. As

(Deposition of Paul Zeigler.)

well as I can remember, he appeared for treatment——

Mr. Franklin: I think the record shows [449] he was referring to a letter that he had written to the Alaska Steamship Company for the purpose of refreshing his recollection, and he answers over on line 9, on page 6.

Mr. Levinson: I think we can go clear on to line 8 on page 7.

Q. Just answer the question. At whose request was that report made?

A. As I remember it—it is so long now—I have forgotten whether he or the skipper requested it.

Q. Captain Zeigler, approximately when, according to your best recollection, did Mr. Lubinski first report for treatment?

A. Well, to the best of my recollection he appeared for treatment some time the latter part of August.

Q. Of 1943? A. 1943.

Q. For what condition did he report for treatment at that time?

A. He came in complaining of intense pain in the left side of the face, and an inability to see clearly from the left eye.

Q. At the time you treated him did he tell you how long his pain and symptoms had persisted before he saw you?

A. I am not so sure about that, but it seems to me he said it had been in existence for two or three weeks, something like that.

(Deposition of Paul Zeigler.)

Q. Captain, you can refresh your recollection.

Mr. Levinson: I object to that, but he can go ahead. [450]

Q. You can refresh your recollection by that document. What examination did you make of his left eye at that time for limited vision?

A. I had no ophthalmoscope and for that reason was unable to make a complete and thorough examination of the eye.

Q. By that do you mean the inside of the eye?

A. Well, the ophthalmoscope is used for visualization into the eye and all of the structures from the interior of the eye through. Because of the lack of the ophthalmoscope my examination was purely from observation and tactile sense—feeling, in other words.

Q. Did you reach any conclusion as to what he was suffering from, from that examination?

A. The eye was inflamed, red, and had a conjunctivitis. There was some discoloration of the iris.

Q. That is the pupil of the eye?

A. The iris is the coloring in the eye.

Q. At the time you made this examination did you observe any evidence of abrasion of the left eyeball itself? A. I did not.

Q. Did you observe any evidence of a foreign body in the left eye? A. I did not.

Q. What did you do with reference to treating him?

A. In the treatment of this man I gave him a hypodermic, thiaman hydrochloride, and then I ir-

(Deposition of Paul Zeigler.)

rigated the eye and instilled into it—I irrigated it with a solution of boric acid. That is what I used to irrigate it with, and instilled into it an ointment of butyn and metaphryn. The ointment was an anæsthetic as well as a [451] mild antiseptic.

Q. How did he respond to this treatment?

A. Very shortly. I will say 24 hours, or maybe 48 hours. I have forgotten which. The pain in his face was almost entirely gone, but the symptoms of the eye were very little improved. That is, he still was unable to see clearly from the eye.

Q. What was the degree of vision that he had when he first consulted you, from what he told you?

A. Very little vision. He had light perception of gross objects. He could see me, but he couldn't make out anything definite.

Q. Would you classify him as economically blind or otherwise at the time you first saw him?

Mr. Levinson: I object to that.

A. Might I ask you what you mean by economic blindness?

Q. I will withdraw the question. What was your opinion as to the degree of useful vision he had?

A. None.

Q. Subsequently, Captain Zeigler, were you able to send Mr. Lubinski ashore and have an eye specialist examine him? A. I did.

Q. And that occurred where?

A. I sent him ashore to the Navy hospital in Adak, to see a medical officer by the name of H. A. Kaven.

(Deposition of Paul Zeigler.)

Q. He was an eye specialist? A. Yes.

Q. You subsequently received a report?

A. I received a report.

Q. You cannot tell what it showed because that would be [452] hearsay. Subsequently did you arrange to have Mr. Lubinski treated or examined in Honolulu?

A. I believe it was the skipper that sent him ashore there for an examination, but I didn't see the report of that examination.

Q. At any time, Captain Zeigler, were you called upon to treat the eyelids, both eyelids of Mr. Lubinski? A. No, sir; not to my recollection.

Q. Captain, did Mr. Lubinski ever advise you or tell you what in his opinion was the cause of the condition of his left eye?

A. I don't recall that he did, other than to say that he had been exposed to cold wind on the deck, as well as dust, and possibly smoke.

Q. At any time that he was under your treatment, Captain, did you observe any evidence of economic damage to the external part of the eye?

A. Now, that sort of a question is a little bit difficult to answer, because with a conjunctivitis it would be possible that that could be the cause; though I did suggest to him that he should have himself examined physically, because the condition of his eye might be caused from his systemic source.

Q. By that you mean what?

A. Such as bad teeth or bad blood, or something of that nature.

(Deposition of Paul Zeigler.)

Q. Did you have occasion to treat his nose or sinuses?

A. Following his examination at Adak I did pack his nose because of the irritation therein.

Q. Did you treat his sinuses at that time? [453]

A. His nose pack was in an effort to relieve the congestion in the nasal passages in the region of the opening into the sinuses.

Q. What was the result of that treatment with reference to the relief afforded Mr. Lubinski?

A. He got quite a bit of drainage after the packs were removed, and some comfort.

Mr. Franklin: That is all.

Cross Examination

By Mr. Levinson:

Q. Doctor, you are a general practitioner?—that is, your training is that?

A. General practitioner, yes, sir; general medicine and surgery.

Q. You are not specializing in eyes, are you?

A. No, sir.

Q. And your only treatment of eyes is such that might follow——

A. The type of work that I have been doing with eyes that is associated with general medicine.

Q. Doctor, you had been on this vessel since June of 1943?

A. That is right.

Q. And when you first saw Mr. Lubinski professionally that was some time——

A. Some time in August.

(Deposition of Paul Zeigler.)

Q. After the Kiska invasion?

A. The invasion was the 15th of August.

Q. This was after that, wasn't it?

A. As I remember it, it was. [454]

Q. Had you had occasion to observe or notice Mr. Lubinski on that vessel before the time he came to you professionally?

A. I had just seen him about on the ship, as I had seen other members of the crew.

Q. And during such time, prior to his professional visit, he appeared to be doing his work normally?

A. As far as I could tell. Of course that was out of my line. I don't know anything about the duties of a boatswain.

Q. I mean with relation to any physical disability. He seemed to be able to do anything?

A. As far as I could tell. Of course if you look on the street and see a man you wouldn't know whether he was seeing good with one eye or both of them.

Q. At the time you examined him professionally, in the latter part of August, his eye, for all practical purposes was valueless?

A. That is right—at the time I examined him.

Q. It would be easily apparent to a cursory examination, the condition he was in? You saw he had some trouble with his eye?

A. That is right.

Q. As soon as he appeared before you you saw that?

A. That is right.

(Deposition of Paul Zeigler.)

Q. And it would be clearly obvious to any person of ordinary perception at any time that something was wrong with the eye?

A. At the time I saw him; yes, sir.

Q. If he had had that eye condition when he joined the [455] vessel it would have been easily apparent?

A. That is right.

Q. You recall at the time of the Kiska invasion there had been a fire on the vessel?

A. That is right.

Q. It was a matter that you could observe, the smoke coming out of the hold?

A. That is right. It filled the hold and the hospital.

Q. And immediately prior thereto, in Attu, there had also been a fire in the forepeak; that is, a lot of smoke coming out?

A. I am not so familiar with that time.

Q. You knew there was such a fire?

A. I had heard of it.

The Court: Is he still talking about Kiska?

Mr. Franklin: Now he is going back to Attu. I had just read line 20 on page 14.

The Court: At line 15 he speaks of Attu.

Mr. Franklin: Yes; that is right, your Honor.

The Court: All right.

Q. There was a lot of smoke?

A. I am not familiar with that incident.

Q. At least it was a matter of common knowledge on the vessel?

(Deposition of Paul Zeigler.)

A. The only thing I know about that is hearsay. I didn't see it or have any experience whatsoever with it.

Q. You, of course, as you stated in your direct examination, had no ophthalmoscope? [456]

A. That is right.

Q. And your examination was limited to your own observation, plus such tactile knowledge as you were able to obtain? A. Yes.

Q. You did not have the facilities, did you, Doctor, to detect whether there was any damage to the inside of the eyeball? A. That is right.

Q. The irritation, or what you observed, was it such that could have been caused by smoke?

Mr. Levinson: Now, your Honor, there is quite a bit of controversy and the objection, and the witness finally answered the question. The objection was made, if the Court please, that it was improper cross examination, because the witness on direct examination had been merely called to testify to the condition he found and the treatment he gave, and that this was an effort to expand his testimony into expressing an opinion as to whether Mr. Lubinski's condition was or was not the result of the exposure, and I have preserved that objection.

The Court: If counsel wish to submit the question the Court is ready to rule upon the objection now.

Mr. Levinson: Before submitting it, he did testify on his direct examination that Lubinski told him it was caused by wind or [457] smoke.

(Deposition of Paul Zeigler.)

The Court: I do not see any reason why you cannot ask him if it was caused by something else, on cross examination. The objection is overruled.

Mr. Franklin: An exception, your Honor.

The Court: Exception allowed.

Mr. Levinson: Beginning on page 17, line 15. The preceding two pages are all colloquy between counsel.

The Court: You are going now to where?

Mr. Franklin: Line 15, page 17.

Q. The irritation, or what you observed, was it such that could have been caused by smoke?

A. The question as put is difficult to answer, in that sometimes eyes appear with a conjunctivitis possibly caused from some irritant such as smoke. It that what you mean?

Q. Just give me what your recollection is, Doctor. Mr. Lubinski could possibly have had some injury to the eyeball which with the limited facilities available to you would not have been apparent; that is correct, isn't it?

A. I don't know how you mean that.

Q. In other words, you made the best examination that you could?

A. Most usually—I would say it would be possible with an eye irritated in that condition, as seen with the meager methods I had of examination—it would have been possible, probably, that some external irritant [458] could have started the situation.

(Deposition of Paul Zeigler.)

Q. The treatment you gave him was a palliative treatment, to reduce the pain?

A. To reduce the pain; clear up any associated external irritation or infection; give the man comfort. And since he had this associated irritation of the side of his face I gave him Vitamin B in an effort to relieve the pain, and the symptoms associated with it.

Q. You didn't expect, or couldn't, with the limited facilities aboard the vessel, you couldn't expect to treat the condition of the eye itself with relation to its visual capacity, or the visual limitation that it had?

A. Well, in a measure I would say it would be in accordance—let me change that a little.

Q. You can strike it altogether and start all over again.

A. Will you state your question again?

(Question read.)

I would say yes, with the facilities we had we could.

Q. Only so far as it may have been caused by some external condition at that time that you saw it?

A. Well, without a complete and thorough physical examination, inclusive of a blood examination and the ability to extract teeth that may have been affected, or give deep treatments for the relief of some inflammatory condition, possibly of the sinuses, or something, I would say no.

(Deposition of Paul Zeigler.)

Q. As far as you were able to ascertain from your examination he apparently had no——

A. (Interposing): I might state this——

Q. Let me finish—he apparently had no systemic condition; [459] he looked to be in good health, looked like a pretty husky boy?

A. Yes; he looked like a healthy person.

Q. And you have to rely almost entirely then on any history that he gave you for any such condition?

A. On the laboratory findings.

Q. Did he give you any history of any systemic condition?

A. None that I recall.

Q. Did you make an examination?

A. I have forgotten. As I remember it, I did. But as I say, this has been a year ago. How can I remember one case out of thousands I have seen?

Q. At least you have no recollection of having him inform you of any such condition?

A. I don't remember.

Q. I want to be fair with you.

A. Seeing thousands of cases in a year's time, and going back to one out of many thousands I have seen, I can't remember all the details.

Q. Of course you are very busy; you are the only doctor aboard?

A. The only medical officer aboard.

Q. And many hundreds of men pass before you?

A. That is right. I have seen several thousand men since this case came up. I don't remember.

Q. In your experience, Doctor, could the condition of which he complained when he came to see

(Deposition of Paul Zeigler.)

you have been caused by a smoke irritant of some kind?

Mr. Franklin: That is objected to on the ground that it is improper cross examination. The doctor has [460] not qualified as an expert. If you care to answer it, Doctor, you may do so.

A. Well, I will tell you, it has been so long since I treated the man that I would like not to answer the question so specifically.

Q. I am just asking you for your opinion, Doctor. That is all I can ask, is your honest opinion, the best you can recall.

Mr. Franklin: Do you want the doctor in answering that to consider that the man had a soft chancre in 1941?

Mr. Levinson: I am asking for the opinion he has, not the opinion you are trying to tell him.

A. I will tell you; at the time I saw the man I told the man that I thought he should have a thorough examination, inclusive of a blood count, or blood Wasserman, because in my opinion, as I told him, this condition is very often caused from some systemic thing.

Q. Is it not also your opinion that a condition of this nature——

Mr. Franklin: What condition are you referring to, neuritis or conjunctivitis or what? Be fair to the doctor.

Q. Is it your opinion that the condition that you observed in this man when you examined him, if caused, as you say, by some systemic condition,

(Deposition of Paul Zeigler.)

might have been quiescent and then have been lit up or become activated by some——

A. That might be possible.

Q. By some smoke irritant?

A. By some external irritant.

Q. That is possible, Doctor? [461]

A. That is possible.

Q. Would it have been probable under those circumstances, assuming the history that the man had no difficulty with his eyes at any time up to the time of the irritation? A. It might be.

Q. That would be a logical conclusion?

Mr. Franklin: Objected to as leading your own witness.

Q. If you want to include the hypothesis of a systemic condition as the cause of the visual failure? A. Well——

Q. Get my question and you may answer yes or no, and then explain if you wish. Do you understand my question?

A. It is so screwed up I don't know if I do.

Q. Let us try again. Let us assume purely for the purpose of this question that there may have been a prior systemic condition which was the basic cause of the visual failure, that the man had no trouble with his eye, that his eye seemed perfectly normal, and he was able to use the eye and had normal vision, with this latent condition within him would it have been possible for the smoke irritant to have caused this condition to become active and

(Deposition of Paul Zeigler.)

to have resulted then and there in a limitation or loss of sight as far as the eye is concerned?

A. It might have been.

Q. For the purpose of this question, assuming the man had good eyes would you then say that the smoke was the causative factor that brought the eye to the condition of a loss of vision?

A. I don't know. [462]

Q. Is it possible in medical science for such a condition to so develop?

A. What kind of smoke are you referring to?

Q. Any strong smoke, any irritant smoke.

A. Maybe I had better have you qualify what type of smoke you refer to in these questions, and what kind of chemical agent is in the smoke.

Q. That I cannot tell you, Doctor, except an ordinary heavy smoke that resulted in a great deal of irritation. Would that be sufficient?

A. Of course smoke getting in the eyes, causing a marked irritation and inflammation might cause something of that kind. That we are unable to say, which came first—the same as the hen or the egg.

Q. Isn't it a fact that any degree of substantial irritation to the eyeball might cause a quiescent condition to become active and affect the sight, where if not for the existence of the prior condition the sight would remain normal with the passage of the irritation?

A. In my opinion——

Mr. Franklin: If you don't know, just say you don't know.

(Deposition of Paul Zeigler.)

A. Such a hypothetical question, I don't know that I am qualified to answer it.

Q. Let me put it this way: I am going to try to be fair——

A. If this is cross examination, I didn't know I was coming up here for that. My opinion, as I have told you—I am no eye specialist, and I am not a specialist in eye, ear, nose and throat diseases—I only treat those who come to me in a general medical sense, and you will [463] have to put the questions to be answered by me as to a practitioner of general medicine, and not as to a person who specializes in eye conditions.

Q. Just let me put it this way. You will not be here at the time of the trial, and the Court might like the benefit of your opinion. Let us put it down to cases rather than a general hypothetical question. We will refer specifically to this man. Let us assume for the purpose of this question that Lubinski had a systemic condition, some source of infection within his body——

Mr. Levinson: I am skipping the colloquy.

Q. (Continuing): —which might be sufficient to have caused a loss of vision, such systemic condition resulting ultimately in an inflammation of one of the coats within the eyeball, of the uveitis; that the man had this latent condition within him, has this systemic condition; he has no trouble with his eyes for, say, four years, or five years prior to the time of your examination—or a substantial time prior thereto; would it be possible that Lubinski

(Deposition of Paul Zeigler.)

having this quiescent condition that an extreme smoke irritation by any type of heavy smoke that would cause the eye to become inflamed, it would increase the activity within the eyeball, the circulation of the blood; would that be sufficient to cause this systemic condition to become active and result in an inflammation of one of the inner linings of the eye? A. In my opinion it might.

Q. You did pack his nose, didn't you?

A. Yes.

Q. To attempt to alleviate some of the pain he had in the [464] sinuses? A. Yes.

Q. These sinuses, of course, have a moist surface, or a mucous membrane?

A. They do have.

Q. To that extent it is somewhat similar to the moist surface of the eyeball?

A. Yes; I would say similar.

Q. And irritation that would become manifest on the moist surface of the sinuses would also become apparent on the moist surface of the eyeball; it would be the same type of irritation?

Mr. Franklin: Objected to as leading. Do not lead your witness.

Mr. Levinson: He is not my witness.

A. Well, some things are a lot more irritant to the eye than they are to the nose. If an irritant is strong enough I would say it is possible to irritate the nose at the same time as the eye.

Q. Then if it was sufficiently strong to irritate the nose and the musous membrane of the sinuses

(Deposition of Paul Zeigler.)

it would certainly have a much stronger effect on the mucous surface of the eye? A. Yes.

Q. And that might set up a secondary condition within the eyeball, because of the activity set in motion by the irritation of the surface of the eyeball?

A. State that again. (Question read) That might be possible, in my opinion.

Mr. Levinson: I think that is all. [465]

The Witness: There is another thing—well, I won't say it, because you will start asking other questions.

Mr. Franklin: I have one last question.

The Witness: Irritation of the wind on the side of the face. That has something to do with it.

Mr. Franklin: In what way, Doctor?

The Witness: Irritation to the nerve in the side of the face.

Mr. Levinson: Go ahead, if you want to take him on from there.

The Witness: I am sorry I mentioned that. I do not want any more questions. I am ready to go.

Q. (Mr. Levinson): Well, that is just ordinary cold. For instance, cold will sometimes cause an injury to the nerve in the side of the face, sleeping by an open window? A. That is right.

Q. That causes a person to have pain or neuralgia in the side of the face?

A. That is right. Off the record and just between us, when he first came in that is what I had in mind.

(Deposition of Paul Zeigler.)

Q. And yet that irritation would not manifest itself by an irritation of the sinuses, would it?

A. It could.

Q. But isn't it a more likely hypothesis that the smoke caused this irritation?

A. I would say the smoke irritates the sinuses more often than a nerve irritation.

Q. And a person who has been to sea a good many years and works on the deck of a ship in all types of weather, [466] and often in strong winds and rain and sleet, as far as facial nerves are concerned, develops more or less of an immunity, doesn't he?

A. I don't know.

Q. In your experience as a medical man—

A. (Interposing): Well, you eat bread every day, and some day you may get a little piece of bread and there is something in it a little irritating to the bowel, or your bowel may not be in par condition that day—that is just enough to throw it off.

Q. What I had in mind was this particular hypothesis of the likelihood of a neuritis in the face as a result of exposure to the wind. Constant exposure to wind in the course of one's occupation has a tendency to toughen the membranes of the face of the average sailor, doesn't it?

A. Yes, I imagine so.

Mr. Levinson: I think that is all, unless you want to start something else.

Redirect Examination

Q. (By Mr. Franklin): Doctor, did you make

(Deposition of Paul Zeigler.)

a diagnosis of what this condition of the eye was that you treated him for?

A. The diagnosis I made was a conjunctivitis and iritis, with associated neuritis of the face.

Mr. Franklin: That is all, Doctor. Thank you.

Recross Examination

Q. (By Mr. Levinson): This conjunctivitis could have been caused by smoke? [467]

A. Or dust or wind, or soapy water or chemicals; or most anything that is irritating. Or it could have come from association with iritis.

Q. If those are eliminated, except smoke, that could have been the cause?

A. Assuming they are eliminated. Smoke does cause an irritation of the eyes.

Q. Just one other question. Did Lubinski seem fair to you?

A. He seemed perfectly fair, and seemed to take me into his confidence.

Q. He answered your questions?

A. He answered my questions freely, was very co-operative, and did everything in his power to do things for his health.

Mr. Levinson: That is all.

Mr. Franklin: Just one other question. You say conjunctivitis frequently is a consequence of an iritis?

Mr. Levinson: No.

The Witness: A conjunctivitis may occur with an iritis.

(Deposition of Paul Zeigler.)

Mr. Franklin: That is all.

Mr. Levinson: That is all.

Mr. Franklin: Doctor Zeigler, do you waive the reading and signing of your deposition?

The Witness: Yes.

Mr. Levinson: I waive the reading and signing of the deposition.

(Deposition concluded.) [468]

Mr. Levinson: I am offering this testimony as indicated.

The Court: This deposition of Captain Paul Zeigler is received as part of the Libelant's case in chief. Does the Libelant rest its case?

Mr. Levinson: I have some rebuttal, and then I will have finished. I have Mr. Lubinski.

The Court: The question is at this stage of the proceedings, do you now close your case in chief?

Mr. Levinson: Yes, your Honor.

The Court: The Libelant's case in chief is closed. The Respondents' case in chief has been rested, and now you wish to offer rebuttal, is that right?

Mr. Levinson: That is correct.

The Court: The Libelant may proceed.

Mr. Levinson: I will recall Mr. Lubinski.

WALTER LUBINSKI,

recalled as a witness in his own behalf as Libelant, testified in Rebuttal as follows, having been previously sworn:

(Testimony of Walter Lubinski.)

Direct Examination

By Mr. Levinson:

Q. Mr. Lubinski, have you ever had syphilis?

A. No, sir.

Q. Or any sinus trouble? A. No, sir.

Q. Any trouble with your teeth?

A. No, sir.

Q. In what condition are your teeth now?

A. Perfect shape. I have three fillings in my mouth. [469]

Q. Have you ever had rheumatism?

A. No, sir.

Q. Have you taken blood tests since you have been going to sea?

A. I have taken them on numerous occasions since 1935.

Q. About how many?

A. Oh, 15 or 20, I guess.

Q. State the result of the blood test?

A. They have all been negative.

Q. Have you ever had a positive blood test?

A. Never.

Q. Have you had X-rays of your body to determine any possibility of disease in your body?

A. Yes, I have.

Q. As far as X-rays would show it?

A. Yes, sir.

Q. What has been the result of those X-rays?

A. They have all been negative.

Q. In general, what has been the condition of your health, except for your eye, up to the present time?

(Testimony of Walter Lubinski.)

A. All I ever had was an appendectomy; and I had a localized soft chancre in Panama. It is the same as a pimple.

Q. How long ago was that? A. 1941.

Q. Have you ever had any other illness or disease, to your recollection?

A. No; none that I know of.

Q. Have you ascertained whether it is possible for you to go for your examination for a Second Mate's license? A. I have. [470]

Q. With relation to your eye, what has been the answer? Can you?

A. No; I cannot get a license now.

Q. Why not?

A. Because I only have one eye.

Q. In the Aleutian Islands, at Attu, on July 15, 1943, how much daylight is there?

A. About 20 or 22 hours.

Q. At 9:00 o'clock at night or 10:00 o'clock at night, at the time of the fire, what was the condition with reference to light?

A. It was broad daylight. Excuse me—if I may say it—you do not have a complete darkness, you just have twilight at that time of the year.

Q. Mr. Kristiensen, the First Mate, testified that no complaint was ever made by you immediately after the fire at Attu, in connection with your eye, that it had been affected and irritated by an explosive fume; is that the fact? A. No.

Q. Was such a complaint made?

A. Yes, sir.

(Testimony of Walter Lubinski.)

Q. By whom? A. By me.

Q. Mr. Kristiensen also testified that he directed you to stow these smoke bombs in the forepeak; is that the fact? A. That is not.

Q. What was your first knowledge that the bombs were stowed there?

A. When I came down to the forepeak to work I seen all that [471] stuff stowed down there.

Q. Mr. Kristiensen also testified that this was your first service as boatswain on a vessel; is that true? A. No.

Q. On how many vessels had you served as boatswain?

A. I have been on some of the biggest ships on this coast.

Q. How many years?

A. The last three years.

Q. The last three years prior to——

A. Prior to this "Flavel."

Q. Mr. Kristiensen testified that you never told him that you had gone to see the Doctor about your eyes prior to the Kiska fire; is that the fact?

A. It is not.

Q. Had you informed Mr. Kristiensen of it?

A. He knew it. It was a standing order. He knew I went down every day. I went down around 8:30 in the morning.

Q. Mr. Seather testified concerning the gas mask, and he stated that it had a mouthpiece that

(Testimony of Walter Lubinski.)

fitted into the mouth. The gas mask that you used, was it that type of mask? A. No, sir.

Q. What kind of arrangement did it have?

A. The mask, as I recall it, that was issued to us by the Army in San Francisco was a plain mask that fits over your face, and has a tube that you breathe through. It is the same as a person giving a "Bronx" cheer at a boxing match or a westling match,—sort of a flutter valve.

Q. Did it have a mouthpiece? A. No.

Q. Mr. Seather testified that you at no time complained that [472] your eyes had become irritated from exposure to the smoke; is that the fact?

A. No.

Q. Was any request or any statement ever made by Seather as to what your condition was?

A. No; there was not.

Q. Dr. Barkan testified in his deposition that you were there on one occasion. In fact, how many times were you there? A. I was there twice.

Q. Captain Zeigler testified that you presented yourself, he said to the best of his recollection, sometime the latter part of August, 1943. Is that the correct date? A. No; it is not.

Q. When did you present yourself for treatment to the Doctor?

A. Right after the Attu fire. Might I explain that?

The Court: You may do so.

The Witness: Right after the Attu fire lots of times Dr. Zeigler was not there. He had about eight

(Testimony of Walter Lubinski.)

assistants, and after the first two or three times, outside of giving me shots in the arm, which was chloride or thiamin chloride—Vitamin B—his attendants took care of me,—his assistants.

Mr. Levinson: That is all.

Mr. Franklin: No questions.

The Court: That is all.

(Witness excused.) [473]

Mr. Levinson: The Libelant rests.

The Court: Do the Respondents rest?

Mr. Franklin: Yes, your Honor.

The Court: How long do you suppose you gentlemen want to argue this matter?

Mr. Levinson: The Libelant would like at least an hour. Usually I do not take that much time, but in this case I think that I will require an hour.

The Court: What is the idea of the Respondents as to time?

Mr. Franklin: I think at least an hour.

The Court: Would counsel have any interest in filing briefs on the facts, as well as the law, before they make their oral argument, so that the court could have in mind your line-up and theory of the facts more accurately? Would counsel on either side have any desire to do that?

Mr. Levinson: If it would be of any assistance to the court.

Mr. Franklin: If it would be of any assistance to the court, we would be very glad to do that.

The Court: This apparently is an important case to both sides, and it will not be an easy case,

I believe, for the court to decide, so I will ask your assistance in that way, that you file briefs.

The trial of this case is not yet finished, and it will not be finished until the Court hears the oral argument, and the case is continued for further trial in the form of oral argument, after you file briefs. I think this case will be placed on the trial calendar for [474] February 20th.

Mr. Franklin: Your Honor, will you fix any time for the filing of briefs, or should they be merely filed prior to that date?

The Court: They will have to be on file before the 19th, all briefs that you wish to file in this matter. And I wish you would have this in mind as one particular objective, that you do all you can to clarify by reference to the record your theory of the facts and the acts of negligence that you claim, or the acts that the respondents may claim to show there was not any negligence, if that is their position. I assume that is their position at this trial.

Mr. Franklin: Yes. I presume your Honor wishes simultaneous briefs?

The Court: Yes. I want all briefs in.

Mr. Long: What we had in mind; does the Libellant file first and then we answer?

The Court: Simultaneous briefs, and all briefs must be on file not later than the 19th of February, 1945.

(Whereupon, further hearing was continued until February 20, 1945.)

[Endorsed]: Filed June 2, 1945. [475]

[Endorsed]: No. 11097. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Walter Lubinski, Appellee, Walter Lubinski, Appellant, vs. Alaska Steamship Co., a corporation, Appellee. Apostles on Appeal Upon Appeals from the District Court of the United States for the Western District of Washington, Northern Division.

Filed: July 12, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11097

WALTER LUBINSKI,

Appellee

vs.

UNITED STATES OF AMERICA,

Appellant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF THE PARTS OF THE APOSTLES ON APPEAL NECESSARY FOR THE CONSIDERATION THEREFORE

Comes now the appellant and files with the above named Court, pursuant to Rule 19, sub-division 6,

of the Rules of this Court, statement of the points on which appellant intends to rely on appeal as follows:

I.

Appellant adopts the assignments of error filed with the United States District Court for the Western District of Washington, in this cause on June 2, 1945, as the statement of points upon which appellant intends to rely on appeal.

II.

Appellant designates each and every item of the certified apostles on appeal except that portion of the transcript of proceedings in Court which will hereafter be designated by appellee, including all exhibits admitted in evidence at the trial, as necessary for the consideration of said appeal and of the points to be relied on by appellant on said appeal.

J. CHARLES DENNIS,
United States District
Attorney

By BOGLE, BOGLE & GATES
STANLEY B. LONG
EDW. S. FRANKLIN
Proctors for Appellant

[Endorsed]: Filed July 23, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

MOTION FOR ORDER DISPENSING WITH
REPRODUCTION OR PRINTING OF EX-
HIBITS.

Comes now the appellant, and moves the Court for an order dispensing with the reproduction or printing of the following exhibits admitted in evidence by the trial Court to-wit:—Libellant's Exhibit 3, Respondent's Exhibit A-3, Respondent's Exhibit A-6, Respondent's Exhibit A-7, Respondent's Exhibit A-8, Respondent's Exhibit A-9, Respondent's Exhibit A-10, Respondent's Exhibit A-11, Respondent's Exhibit A-12, Respondent's Exhibit A-14.

This motion is based upon the records and files herein and upon the affidavit of Edw. S. Franklin, one of the proctors for appellant, hereto attached.

J. CHARLES DENNIS,

United States District

Attorney

By BOGLE, BOGLE & GATES

STANLEY B. LONG

EDW. S. FRANKLIN

Proctors for Appellant.

So Ordered:

FRANCIS A. GARRECHT,

Senior United States Circuit

Judge

State of Washington

County of King—ss.

Edward S. Franklin, being first duly sworn on oath deposes and says: That he is one of the proctors for appellant in the above entitled action; that he is familiar with all of the exhibits introduced in evidence at the trial of the above-named action; that many of said exhibits are not of a printable type and many of them cannot be reproduced or printed are reproduced in the transcript of proceedings; that the material portions of Libelant's Exhibit 3 have been read into the transcript of evidence and their reproduction would be duplicious; that Respondent's Exhibit A-3 is a photostatic copy of the General Agency agreement; the material portions thereof being read in evidence; that Respondent's Exhibits A-6, A-7 and A-8 are photographs; that Respondent's Exhibits A-9 and A-10 are charts and diagrams; that Respondent's Exhibit A-11 is a copy of the shipping articles, the material portions of which were read in evidence; Respondent's Exhibit A-12 is a voluminous record of the original hospital record of Libelant containing charts, diagrams, etc.; that Respondent's Exhibit A-14, is the testimony by deposition of Dr. James C. Schumacher, already read into evidence

during the trial and appearing in the transcript of record.

EDW. S. FRANKLIN

Subscribed and Sworn to before me this 18th day of July, 1945.

(Seal) ARTHUR G. GRUNKE

Notary Public in and for the State of Washington,
residing at Seattle.

The appellee above named consents that the foregoing motion be granted and that these exhibits be considered in their original form, not reproduced or printed.

SAM L. LEVINSON

Proctor for Appellee

[Endorsed]: Filed July 23, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-
TION OF THE RECORD UPON WHICH
CROSS-APPELLANT INTENDS TO RELY
ON HIS CROSS-APPEAL

(1) That the libelant was an employee of the respondent Alaska Steamship Company under the facts and circumstances of his employment on the SS George Flavel, and under the rights and obligations assumed by the respondent Alaska Steamship Company under the General Agency Agreement, and the allocation of the SS George Flavel

to the respondent Alaska Steamship Company, the respondent Alaska Steamship Company was jointly liable with the respondent United States of America and was improperly dismissed.

(2) That the cross-appellant hereby designates the following portions of the record upon which he will rely:

Exhibit A-3, Exhibit A-4, and Exhibit A-5;

Transcript of Testimony: Lubinski, page 21. Killingsworth, page 213, line 1, to page 226, line 24. Kenney, page 290, line 21, to page 294, line 16, and page 306, line 23, to page 311, line 18. Tomlinson, page 394, line 25, to page 402, line 7.

SAM L. LEVINSON

Proctor for Libelant-Appellee.

Copy Received Jul. 18, 1945.

BOGLE, BOGLE & GATES

[Endorsed]: Filed July 23, 1945. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 11097

UNITED STATES OF AMERICA, *Appellant,*

vs.

WALTER LUBINSKI, *Appellee,*

WALTER LUBINSKI, *Appellant,*

vs.

ALASKA STEAMSHIP COMPANY, a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DIS-
TRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States District Attorney

BOGLE, BOGLE & GATES
(Of Counsel)
Proctors for Appellant.

1017 U. S. Court House,
Seattle, Washington.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 11097

UNITED STATES OF AMERICA,	<i>Appellant,</i>
vs.	
WALTER LUBINSKI,	<i>Appellee,</i>
WALTER LUBINSKI,	<i>Appellant,</i>
vs.	
ALASKA STEAMSHIP COMPANY, a corporation,	<i>Appellee.</i>

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States District Attorney

BOGLE, BOGLE & GATES
(Of Counsel)
Proctors for Appellant.

1017 U. S. Court House,
Seattle, Washington.

INDEX

	Page
Statement Disclosing Jurisdiction.....	1
Statement of the Case.....	2
Question Involved.....	8
Effect of District Court's Findings and Decree.....	8
Burden of Proof Assumed by Appellee.....	9
Negligence Under Jones Act.....	12
Legislation for Wartime Merchant Seamen.....	12
I. First Assignment of Error Relied Upon.....	14
Cargo Originally Stowed by Army.....	15
Stowage of Smoke Signals in Forepeak.....	16
Distress Signals Not Bombs or Ammunition.....	19
Appellee's Proof of Negligent Stowage.....	21
Coast Guard Regulations of Stowage.....	22
Appellee's Expert Witnesses on Stowage.....	24
Escape of Smoke Signal an Intervening Cause.....	25
No Evidence to Show What Caused Distress Signal to Escape..	26
Testimony of Uzdadinis.....	27
Alleged Acts of Uzdadinis Not Forseeable.....	36
II. Argument on Second Assignment of Error.....	38
The Kiska Fire.....	38
Fire at Sea an Assumed Risk.....	42
II. Arguments on Third Assignment of Error.....	42
Nature of Iritis.....	44
Dr. Zeigler's Testimony.....	44
Dr. Dorman's Testimony.....	46
Testimony of Dr. Schumacher.....	48
Testimony of Dr. Otto Barkan.....	51
Testimony of Dr. James R. Morrow.....	52
Lower Court's Erroneous Conclusion.....	53
IV. Argument on Fourth Assignment of Error.....	55
V. Conclusions	55

TABLE OF CITATIONS

	Page
American Pacific Whaling Co. v. Kristensen, 93 F. (2d) 17.....	11
Arizona v. Anelich, 298 U. S. 110, 80 L. ed. 1085.....	42
Atcheson T. & S. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671.....	26
Atlantic Coast Line v. Tiller, 318 U. S. 54, 87 L. ed. 610.....	10
Calmar S. S. Corporation v. Taylor, (C.C.A. 3) 92 F. (2d) 86.....	37
Cortes v. Baltimore Insular Lines, 287 U. S. 367, 77 L. ed. 368.....	12
De Zon v. American President Lines, 129 F. (2d) 404.....	11
De Zon v. American President Lines, 318 U. S. 660, 87 L. ed. 1065..	55
Drain v. Shipowners & Merchants Tow Boat Co., Ltd., 1945 A. M. C. 892.....	11
Horton Motor Lines v. Currie, 92 F. (2d), 164, (C. C. A. 4).....	41
Johnson v. Kosmos Portland Cement Co., (C. C. A. 6) 64 F. (2d) 193	37
Katoska v. May Dept. Stores Co., 28 F. Supp. 3.....	41
Matson Navigation Co. v. Pope & Talbot, 149 F. (2d) 205.....	9
Pittsburg S. S. Co. v. Palo, (C. C. A. 6) 64 F. (2d) 198.....	37
Showalter v. Western Pacific R. Co. (Cal.) 96 Pac. (2nd), 964 at p. 966.....	10
Sundberg v. Washington Fish & Oyster Co. (1943) 138 F. (2d) 801, (C. C. A. 9).....	36
The Baymead, 88 F. (2d) 144.....	12
The Cricket, 71 F. (2d) 61, (C. C. A. 9).....	12, 42
The Diamond Cement, 95 F. (2d) 739, (C. C. A. 9).....	8
The Ernest H. Meyer, 84 F. (2d) 496.....	9
The Hornet, 58 U. S. 100, 15 L. ed. 58.....	25
The Lake Lida, (C. C. A. 5) 290 F. 178.....	23
The Liberty Glo, 1937 A. M. C. 111.....	24
Thomas v. Pacific S. S. Lines, 84 F. (2d) 506.....	9
United States v. Thompson, (1922) 257 U. S. 419 66 L. ed. 299.....	23
Wabash Ry. Co. v. Walczak, 49 F. (2d) 763, (C. C. A. 6).....	41

STATUTES

	Page
28 U. S. C. A. §41 (3).....	2
28 U. S. C. A. §227.....	2
45 U. S. C. A. §51 et seq.....	9
46 U. S. C. A. §170 (7) (a).....	22
46 U. S. C. A. §688.....	2, 9
46 U. S. C. A. §742.....	2
46 U. S. C. A. §1128.....	13
50 U. S. C. A. §1291.....	2, 13

TEXTS

	Page
38 Am. Jur. 2, p. 642.....	12
38 Am. Jur. 68, p. 725.....	26
Code of Federal Regulations of the United States of America, Cumulative Supplement, Title 46, Pg. 10776.....	22
1943 Supp. to the Code of Fed. Reg. Title 46, pg. 2127 et seq.....	13

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11097

UNITED STATES OF AMERICA,	<i>Appellant,</i>
vs.	
WALTER LUBINSKI,	<i>Appellee,</i>
WALTER LUBINSKI,	<i>Appellant,</i>
vs.	
ALASKA STEAMSHIP COMPANY, a corporation,	<i>Appellee.</i>

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT UNITED STATES OF AMERICA

STATEMENT DISCLOSING JURISDICTION

This is an appeal from the decree of the United States District Court for the Western District of Washington, Northern Division, sitting in admiralty. The action was instituted by the filing of a libel in personam (Aps. 2) by Walter Lubinski seeking recovery of \$25,000.00 damages for the loss of vision in his left eye from the United States of America and Alaska Steamship Company, a corporation,

allegedly due to negligent conditions existing aboard the S.S. "GEORGE FLAVEL." The decree of the lower court dismissed the Alaska Steamship Company as a party to the libel, but entered a decree awarding damages against the United States of America as owner and operator of the vessel in the sum of \$17,500.00. The United States of America has appealed from this decree and Lubinski has cross-appealed from the decree of dismissal entered in favor of Alaska Steamship Company.

This action of a maritime nature, is governed by the Suits in Admiralty Act (46 U. S. C. A. §742) and the Jones Act (46 U. S. C. A. §688) and 50 U. S. C. A. §1291). It is properly brought in the United States District Court (46 U. S. C. A. §742), 28 U. S. C. A. 41 (3). From a final decree in appellee's favor and entering judgment in his favor, an appeal lies to this Court. (28 U. S. C. A. §227).

STATEMENT OF THE CASE

Walter Lubinski, a merchant seaman, joined the S.S. "GEORGE FLAVEL" as boatswain at San Francisco, California, in June of 1943. The S.S. "GEORGE FLAVEL" was a Liberty type transport vessel, which had been allocated to the United States Army for operation as a unit of the invasion flotilla assigned to Alaska military operations against the Japanese (Aps. 234). The cargo consisted

of ammunition and military equipment (Aps. 234). It was loaded on the ship at San Francisco under the supervision of transport officers of the United States Army, who accompanied the ship thereafter at all times on the Alaska invasion (Aps. 273).

In addition to twelve hundred soldiers, the merchant crew of the vessel and a Naval gun crew assigned to the S.S. "GEORGE FLAVEL," there was a Naval amphibious unit aboard numbering approximately sixteen men. Its equipment consisted of gear, landing barges, foodstuffs and smoke or distress signals for each of the eight landing barges (Aps. 276), and was taken aboard at San Francisco.

The smoke or distress signals were contained in a tin gallon can fitted with a screw top; four such signals were packaged in a cardboard carton container. (Aps. 276). These signals are customarily used at sea and carried in lifeboats for emergency use (Aps. 301). To release the signal, the cap is unscrewed and an orange substance, lighter than air, is emitted. (Aps. 276). The chemical composition of these signals was not disclosed during the trial of the action.

At San Francisco the equipment of the amphibious unit had been stowed on the open deck of the vessel (Aps. 276), because of unavailability of other stowage space (Aps. 298). As the vessel proceeded north to Alaska, this equipment was

exposed to the rain and was deteriorating (Aps. 279). To prevent further damage, Chief Mate Kristiansen ordered Lubinski, as boatswain, to stow it in the forepeak of the vessel. (Aps. 302). Captain Goodwin, Master of the vessel, felt this was the safest place to stow the equipment (Aps. 236), and there was plenty of available space in the forepeak. (Aps. 247). In addition the amphibious unit was permitted to work on its invasion equipment in the forepeak (Aps. 237), after it was stowed there. As boatswain, Lubinski was in charge of the forepeak and had a key to it.

Access to the forepeak was furnished by means of a steel ladder running from a hatch in the main deck to this compartment which is located in the extreme forward end of the vessel. (Aps. 108). There is a carpenter shop aft adjoining the forepeak. (Aps. 109).

On the night of July 15, 1943, the S.S. "GEORGE FLAVEL" was lying at Attu, Alaska. Lubinski and other seamen were repairing some gear in No. 2 hold. (Aps. 57). A seaman, Steve Uzdadinis, was sent by Lubinski to the forepeak for some tools. (Aps. 57). Uzdadinis's testimony as to his actions in the forepeak is confusing and evasive. In his search for tools, he stated he visited the carpenter shop aft and "supposed" he kicked a case containing some smoke signals. (Aps. 171). Thereafter he returned to the No. 2 hatch and proceeded to lower the tools down to the lower

hold. After the expiration of some time, estimated variously as one hour by Peter Corvia (Aps. 209), as ten minutes by Robert T. Kennedy (Aps. 351), and as five minutes by Uzdadinis (Aps. 172), someone shouted "Fire in the Forepeak."

First Mate Kristiensen, Second Officer Seather, Lubinski and other seamen rushed to the forepeak, where orange colored smoke was billowing forth through the hatch opening to the forepeak. (Aps. 63). Lubinski donned a regulation U. S. Army gas mask (Aps. 147), and went below on several occasions to investigate the cause of trouble. The gas mask he used fitted snugly over his face (Aps. 147), and his eyes were protected from contact with the smoke by the mask. (Aps. 147). The same mask was subsequently used by Chief Mate Kristiensen and Second Officer Seather (Aps. 314), who likewise descended into the forepeak to investigate the cause of the smoke. No fire was discovered. Later the charred remains of a smoke signal were found in the forepeak back of the ladder leading to the main deck some distance from the carpenter shop. (Aps. 311). The screw cap of the tin containing the smoke signal was missing (Aps. 378), and the container was empty.

Lubinski claimed when he removed his mask after visiting the forepeak, both of his eyes burned badly (Aps. 66), and were swollen. (Aps. 67). Subsequently his right eye

recovered, but he claims he was required to receive constant treatment aboard the vessel from the Army Transport Surgeon, Dr. Paul Zeigler, for the ensuing month following this incident, because of pain and impaired vision in his left eye. Dr. Zeigler, the transport physician, states he first treated Lubinski the latter part of August, 1943 (which would be subsequent to the Kiska incident hereinafter referred to). (Aps. 500).

On the morning of the Kiska invasion (August 15, 1943) the S.S. "GEORGE FLAVEL" was lying near the beach-head having begun the discharge of soldiers and supplies about five o'clock that morning. Soldiers were discharging military supplies from No. 3 hatch aft about 10:00 A. M. that morning under the supervision of a United States Army Transport Officer, Lt. Hill. (Aps. 290). Smoke was observed issuing from No. 3 hatch and a fire alarm was sounded. (Aps. 69). Lubinski went below to investigate. (Aps. 79). He again wore a regulation U. S. Army gas mask. (Aps. 149). He remained below eight minutes. (Aps. 149). A dense pall of smoke was rolling out of the No. 3 hatch making visibility very poor. As Lubinski started to emerge from the hatch and mount the ladder leading to the deck, he claims to have been struck in the face by the force of a deck hose which was being played on the fire below by seamen unknown to him (Aps. 149), but identified by another witness as members of the steward's department. (Aps. 199).

Lubinski claims his gas mask was knocked momentarily to one side (Aps. 150), which exposed his face to the smoke in the hatch for about twenty seconds, during which time he ascended the ladder without replacing his mask in position. (Aps. 80, 150).

It was subsequently discovered that the fire at Kiska in No. 3 hatch was caused by an Army vehicle, a "snow jeep" which had been stowed in the "tween decks" of No. 3 hatch and which backfired when some soldiers started it preparatory to its discharge. (Aps. 368). Some dunnage bags in the jeep were ignited and created a "rubbish smoke." Aps. 368).

After the Kiska invasion the S.S. "GEORGE FLAVEL" returned to Adak where she remained for about eight days. Lubinski testified he was given "hypos" for excessive pain in his left eye (Aps. 80), during this period. He was next examined by the United States Health Service in Honolulu, where the vessel put in after leaving Alaska, and was advised to return to the States. (Aps. 81). The voyage terminated in Seattle, Washington, in September, 1943. (Aps. 81).

Lubinski entered the United States Marine Hospital in San Francisco, California, where he was a patient from October 18, 1943, to February 9, 1944, receiving treatments for his left eye. The disease which has admittedly de-

stroyed the vision in his left eye is a disease of the inner structures of the eye, described as an "iritis" or an "iridocyclitis."

QUESTION INVOLVED

This appeal presents only a question of the validity of the findings of fact, conclusions of law and decree awarding appellee \$17,500.00 damages against the United States of America, for the loss of vision of his left eye. The appeal is here de novo.

EFFECT OF DISTRICT COURT'S FINDINGS AND DECREE

In the District Court, eighteen witnesses testified, ten of whom testified by deposition. Of the eight witnesses who testified orally, only appellee, Robert Kenny, a seaman, and appellee's expert witness, Dr. Dorman, testified to substantial matters. Appellee's key witnesses as to the asserted negligence, Steve Uzdadinis and Peter Corvia, as well as all of appellant's material witnesses, except Dr. Morrow, its expert, testified by deposition.

Under such circumstances the presumption in favor of the findings of the trial court will be accorded its lightest weight.

The Diamond Cement, 95 F. (2d) 739 (CCA9).

As this court said in the recent case of *Matson Navigation Co. vs. Pope & Talbot*, decided May 19, 1945, 149 F. (2d) 205:

“The rule in admiralty cases is that, although an appeal opens the case for a trial de novo, findings of fact are entitled to great weight, but such rule is modified where the findings are based wholly upon depositions. * * * (citing cases). In cases in which witnesses testify in open court and depositions are also introduced, the rule is subject to modification in the sound judgment of the appellate court.”

In *The Ernest H. Meyer*, 84 F. (2d) 496, this court said:

“It is obvious that where the testimony is in part by deposition and in part, heard by the court, and the conflict is between the heard and unheard witnesses there cannot be a balancing of credibility between the two.”

This case presents a situation where nearly all of the substantial evidence in the case was presented by deposition with the appellate court being in as favorable a position as the trial court in determining the credibility of the witnesses and the weight to be accorded their testimony.

See also *Thomas vs. Pacific S. S. Lines*, 84 F. (2d) 506.

BURDEN OF PROOF ASSUMED BY APPELLEE

Under the Jones Act (46 U. S. C. A. §688) seamen are given the same rights for negligence as railroad employees are given under the Federal Employers Liability Act (45 U. S. C. A. §51 et seq.), and assume the same procedural burdens.

The United States Supreme Court in the recent case of *Atlantic Coast Line v. Tiller*, 318 U. S. 54, 87 L. Ed. 610, has held that in order to sustain a recovery in this type of litigation two elements must be proved by a preponderance of evidence; (1) negligence of the employer, and (2) that such negligence was the proximate cause of the accident in whole or in part.

Nor is the scintilla of evidence rule recognized in cases under the Federal Employers Liability Act as meeting the burden of proof cast upon a plaintiff. Substantial evidence as to negligence and that it was the proximate cause of the injury claimed are indispensable requisites to recovery.

"It is clear under the federal decisions that the so-called scintilla of evidence rule is rejected and that substantial evidence must be produced by the plaintiff in order to sustain the burden of proof. *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (citing cases * * *. Such evidence must be direct or circumstantial but there must be substantial evidence, direct or circumstantial to show that negligence on the part of the carrier was the proximate cause or one of the proximate causes of the accident. Evidence which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient. (Citing cases).

Showalter v. Western Pacific R. Co. (Cal.) 96 Pac. (2nd), 964 at p. 966.'"

This court has repeatedly required a seaman suing under the Jones Act to establish the claimed acts of negligence by the shipowner by substantial evidence.

In the very recent case (decided June 13, 1945), *Drain vs. Shipowners & Merchants Towboat Co., Ltd.*, 1945 A. M. C. 892, this court commended the following statement made by District Judge Goodman:

“The Supreme Court has held that seamen are wards of the Admiralty and that the policy is to afford them the fullest protection. That protection extends to their maintenance and cure in case of injury, and also of course to their compensation for disability suffered in the course of their employment. That does not mean, however, that seamen will get a judgment when there is no liability at all. In this case there is not the slightest evidence of negligence.”

And earlier (1942) in *De Zon vs. American President Lines*, 129 F (2d) 404, this court said:

“ * * * We must also be mindful of the fact that although the Jones Act has given ‘a cause of action for the seaman who has suffered personal injury through the negligence of his employer,’ still it does not make negligence which was not negligence before and does not make the employer responsible for acts or things which do not constitute a breach of duty.”

In *American Pacific Whaling Co. vs. Kristensen*, 93 F. (2d) 17, this court said of an action by a seaman under the Jones Act:

“It will thus be seen that negligence constitutes the gravamen of this case. Defective appliances are not per se due to the negligence of the employer, as in other cases of admiralty and he is not liable for ‘any defect or insufficiency in plant or equipment that is not attributable to negligence.’ ”

In two cases, *The Cricket* 71 F (2d) 61, and *The Baymead*, 88 Fed. (2d) 144, this court held a shipowner was not required to furnish the best possible accommodations for the crew.

NEGLIGENCE UNDER JONES ACT

Negligence has generally been defined as follows:

“Negligence in the popular sense is the lack of due diligence or care. Actionable negligence or negligence in the legal sense has been defined as a violation of the duty to use due care. It is doubtful, according to some authorities whether a more comprehensive definition is possible.”

38 *Am. Jur.*, §2 pg. 642.

The United States Supreme Court has defined this concept under the Jones Act in the case of *Cortes vs. Baltimore Insular Lines*, 287 U. S. 367, 77 L. Ed. 368, as follows:

“Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i.e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman’s remedy is to be the same as if a like duty had been imposed by law upon carriers by rail.” * * *

LEGISLATION FOR WARTIME MERCHANT SEAMEN

With the advent of World War II and the operation of all merchant shipping by the United States government as

an aid to the successful prosecution of the war the peace time hazards of merchant seamen were considerably enlarged. They then became exposed to two types of injuries, (1) those incident to the peace time operation of merchant vessels and (2) war risks.

With its traditional liberality for seamen, Congress legislated in the interest of the new status of merchant seamen employed on government vessels during war time. As to the first type of injury, Congress by the act of March 24, 1943, 57 Stat. 45, 50 U.S.C.A., §1291, extended to such seamen the same rights for the enforcement of a claim of personal injuries as "*if the seamen were employed on a privately owned and operated American vessel*. This legislation obviously made available the Jones Act to wartime merchant seamen in cases of negligence.

As to war risks which these seamen encountered, pursuant to Congressional authority (46 U.S.C.A. §1128 (a)), the Maritime War Emergency Board promulgated on March 15, 1943, a comprehensive life and disability insurance policy applicable to all seamen sailing on governmentally operated vessels. It is known as "Second Seamen's War Risk Policy," which is set out in full in the 1943 Supplement to the Code of Federal Regulations, Title 46, page 2127 et seq. The cost of this insurance was born exclusively by the government.

Undoubtedly the difficulty of applying the usual peace time formulae of negligence to war shipping conditions was one of the considerations impelling the promulgation of the Second Seamen's War Risk Policy by the United States.

It is appellant's position that if appellee can substantiate that the loss of vision in his left eye was due to the exposure to the smoke of the distress signal at Attu, Alaska, on July 15, 1943, or to the smoke from the burning "jeep" at Kiska, Alaska, a month later, his claim could be covered under the Second Seamen's War Risk Policy.

FIRST ASSIGNMENT OF ERROR RELIED UPON

- (1) The Court erred in making finding of Fact III for the reason that said finding is not sustained by the weight of the evidence and is clearly erroneous. (Aps. 21.)

The finding of fact attacked reads as follows:

"That sometime prior to the 15th day of July, 1943, while said vessel was in navigable water at Attu, Alaska, the officers of said vessel negligently permitted and directed the stowage of certain smoke signal bombs in the forepeak of said vessel along with the gear of said vessel. That on the 14th day of July, 1943, a member of the crew of said vessel entered the forepeak for the purpose of obtaining gear and while there knocked over or kicked over one of said smoke signal bombs, causing the escapement of a large quantity of gas, smoke and fumes. That libelant, in the course of his employment, entered said forepeak for the purpose of assisting in extinguishing said gas, smoke and fumes therefrom,

and that the gas, smoke and fumes therefrom, permeated libelant's gas mask and irritated and injured his eyes. That shortly thereafter libelant's eyes became inflamed and resulted in a loss of vision in his left eye. (Aps. 15.)

This article makes two distinct charges of negligence, (1) improper stowage of the distress signals in the forepeak of the S.S. "GEORGE FLAVEL" and (2) a subsequent knocking over or kicking of the distress bomb resulting in the escapement of its contents by a seaman not identified in the libel but subsequently asserted to be one Steve Uzdadinis, appellee's sole witness to this alleged incident. These incidents will be discussed separately.

CARGO ORIGINALLY STOWED BY ARMY

The testimony establishes that on or about June 25, 1943, the S.E. "GEORGE FLAVEL" was assigned exclusively to the United States Army to carry troops and ammunition and military supplies for the Alaskan invasion and the loading thereof began and was completed in San Francisco, California, under the exclusive supervision of officers of the United States Transportation Corps, who thereafter accompanied the vessel North.

Captain Charles L. Goodwin testified:

"Q. Did you as master of the vessel have anything to do with loading these supplies?

"A. No, sir.

"Q. Who loaded them?

"A. That was loaded by the Army." (Aps. 234.)

After the vessel reached Alaska, the same procedure obtained. Captain Goodwin further testified:

"Q. Were you also taking on and discharging cargo after reaching Alaska?

"A. Yes.

"Q. Who was in charge at that time of designating what cargo would be loaded and where it would be stowed?

"A. The Army." (Aps. 238.)

Similar testimony was given by Chief Officer John Kristiansen (Aps. 272, 273) and Second Officer Jorgen L. Seather. (Aps. 322 and 323.)

STOWAGE OF SMOKE SIGNALS IN FOREPEAK

Chief Officer Kristiansen testified that the equipment of the Naval amphibious unit, consisting of rations and distress signals and gear was stowed forward on the main deck when the vessel left San Francisco, (Aps. 275) and was deteriorating enroute to Alaska because of being exposed to rain and sea dampness so he ordered appellee, as boatswain to stow this equipment in the forepeak. (Aps. 302.) He explained:

“A. Yes. All the food was lying around there. I thought it was a shame for it to be lying around. And also the smoke bombs with it. It was all lying there and would get spoiled; malted milk, biscuits and crackers and all that stuff. It was all mixed together.” (Aps. 302.)

As befitted the tragic necessities of the vessel's mission, stowage space was at a premium and there was no place available other than the forepeak for the stowage of this deteriorating military equipment.

Chief Officer Kristiansen testified:

“A. Yes, that is the only place we had to put them. Lockers were very scarce aboard because they had everything filled up that they possibly could.” (Aps. 928.)

Captain Goodwin, who had approved the stowage of this equipment in the forepeak and permission for the amphibious unit to work there while the vessel was enroute to invasion points, said he did so for the following reasons:

“Q. Why did you think the forepeak would be the safest port of the ship to stow any of this invasion cargo?

“A. The only ones which had access to it was our crew and if we stowed it down in the holds, they might be down there looking for something else, the Army, when they were looking for different items. And it was handy to get at in case you needed it in a hurry and you want to get it in a place so if you need something you can get it in a hurry.” (Aps. 236.)

Captain Goodwin corroborated Chief Officer Kristiansen that the forepeak was the only available spot for this stowage.

“Q. The forepeak of a new ship like “FLAVEL” and with new equipment is usually pretty full?

“A. No. Ours was not so full. We had lots of space there.” (Aps. 247.)

Appellee admitted that when the vessel left San Francisco every available space for cargo was occupied.

“Q. But every conceivable space for cargo was used when you left San Francisco, wasn't it?

“A. Yes.” (Aps. 104.)

Appellee described the equipment of the Naval amphibious unit stowed in the forepeak as food rafts, guns and smoke signals, and they were exposed to the elements:

“Q. And those had all been laying on the deck exposed to the elements before they were stowed in the forepeak,

“A. Yes, sir.” (Aps. 104.)

The smoke signals, destined for installation of the landing barges, were packed four to a cardboard carton container and the signal itself, a chemical, was encased in a gallon tin container, and securely stoppered with a screw cap as a safeguard against tampering. (Aps. 276.) There were several of these cases (Aps. 110). Appellee claimed

they were stowed in the forepeak and aft in the carpenter shop (Aps. 276) while Chief Officer Kristiansen testified they were stored on the starboard side of the forepeak, only, under some shelves. (Aps. 277.)

As to his reason for permitting the Naval amphibious unit to use the forepeak of the vessel while they were cleaning and assembling their guns, Kristiansen testified:

“A. They were guns for the landing barges, yes. They were boxed up, yon know, and came aboard mixed in with the rest of the stuff that they picked out. Instead of being on deck, I let them go down there and do it because it was dry down there, and wet and miserable on deck.” (Aps. 280.)

Thus, the stowage of this equipment in the forepeak accomplished a dual beneficial purpose of preventing the destruction of vital military equipment and affording the amphibious unit necessary quarters to prepare their ordnance for the contemplated invasion.

DISTRESS SIGNALS NOT BOMBS OR AMMUNITION

The trial court evidently labored under a misapprehension as indicated in Finding of Fact III and its memorandum opinion that the distress signals possessed the hazards and propensities of military bombs or ammunition and were, *per se*, dangerous instrumentalities. The evidence warrants no such inference. Even conceding the correctness of the

trial court's belief, the stowage of the bombs in the forepeak was a matter of sheer military necessity and exigency since no other space was available aboard the vessel for their reception. Applying the peace time formulae of "due care" to the incongruous situation of a military invasion this stowage would still meet the requisite test of an act which a reasonable man would feel obliged to do under these extreme circumstances.

The chemical composition of these devices was not disclosed at the trial of the case other than the fact the containers released an orange colored signal haze or smoke when unscrewed. There was no testimony or inference that they generated fire, or could be classed as combustibles or pyrotechnics. Chief Officer Kristiensen vigorously denied these signals were ammunition:

"A. You cannot call that ammunition because that is why we have lifeboats. They have them in the lifeboats for distress.

"Q. Smoke bombs?

"A. Yes. We have them in the lifeboats. They put them on the water at sea and in case we are in distress some ship can see them. That is what they are for."
(Aps. 301.)

Second Officer Seather likewise declared the signals as non-hazardous.

“A. Well, they are all supposed to be safe, and there are several, to my knowledge, when they come aboard—we have several cases on board the ship right now.

It is ship’s gear regulation equipment.” (Aps. 378.)

It is quite likely that the court was misled as to the propensities of these distress signals by the frequent reference to them in the trial of the action below as “smoke bombs,” a title by which they are loosely characterized by seamen. However, there is no evidence in the record they possess those explosive or detonating qualities commonly associated with bombs. The record shows they are designed for emergency use at sea, solely for signal purposes. It must be assumed since their use may be required by persons huddled on life rafts or in lifeboats, and the signal released in the immediate vicinity of such persons who have no control over atmospheric conditions, that such signals possess only harmless ingredients.

APPELLEE’S PROOF OF NEGLIGENT STOWAGE

To establish proof of negligent stowage of the smoke signals in the forepeak, appellee relied upon his Exhibit 3, a publication of the United States Coast Guard, entitled “Regulations Governing Transportation of Military Explosives on Board Vessels during Present Emergency” (Aps. 99) and the supposedly expert opinion of appellee himself, and three seamen witnesses, John Connolly, Nicholas M. Gladis and William Huck.

COAST GUARD REGULATIONS OF STOWAGE

Appellee's Exhibit 3 was dated October 1, 1943. It was admitted over appellant's objection as to incompetency and immateriality, (Aps. 99) there being no proof tendered these regulations were in effect on July 15, 1943, the date of the escape of the smoke signal from its container at Attu, and they were inapplicable to the S.S. "GEORGE FLAVEL."

These regulations are issued pursuant to authority conferred upon the Secretary of Commerce to regulate the shipment of explosives on vessels on the navigable waters of the United States by Section 170 (7) (a) of the 1940 Federal Carriage of Explosives or Dangerous Substances Act, 46 U.S.C.A. Sec. 170 (7) (a).

By Section 170 (1) the 1940 Act is specifically declared to be inapplicable to *"any public vessel which is not engaged in commercial service."*

This specific exemption of applicability of the 1940 Explosives Act and regulations promulgated thereunder to public vessels is re-enacted in Section 146.02-2 (a) of Appellee's Exhibit 3, (Code of Federal Regulations of the United States of America, Cumulative Supplement, Title 46, Page 10776, which reads as follows:

"Sec. 146.02-2 (a) The regulations in this part shall not apply to any public vessels which is not engaged in commercial service."

It is to be noted that the 1940 Federal Carriage of Explosives Act was passed before the Second World War and its primary purpose was the regulation of the carriage of explosives on merchant and passenger ships.

That the S.S. "GEORGE FLAVEL," used exclusively as an Army Transport under the sole jurisdiction of the United States Army, carrying troops and ammunition exclusively for the Alaska invasion was a public vessel of the United States seems too plain to require citation of authority.

In so classifying a merchant vessel loaded with relief supplies destined for Belgium after the termination of the First World War, the United States Supreme Court, in the case of *United States vs. Thompson* (1922) 257 U. S. 419, 66 L. Ed. 299, said:

"It is suggested that the Western Maid was a merchant vessel at the time of the collision, but the facts the food was to be paid for and the other details adverted to cannot disguise the obvious truth that she was engaged in a public service and that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandising than if she had carried a regiment of troops."

See also *The Lake Lida* (C.C.A. 5) 290 F. 178.

Obviously Appellee's Exhibit 3 laid down no duty which was breached by the S.S. "GEORGE FLAVEL" in stowing

the distress signals in the forepeak and was inapplicable to the voyage in question.

APPELLEE'S EXPERT WITNESSES ON STOWAGE

Appellee called three fellow seamen, Nicholas M. Gladis (Aps. 70), William Huck (Aps. 140), and John Connolly (Aps. 143), who testified as to the common practice existing in merchant vessels in stowing combustible materials in lockers. Appellee himself so testified (Aps. 53, 54, 55). Such standards of practice existing on merchant vessels furnish no criteria for a vessel, such as the S.S. "GEORGE FLAVEL," which was a component of the Alaska invasion flotilla and under the sole jurisdiction of the United States Army. Distress signals cannot be classified as "combustibles" since they do not produce fire. Testimony of this character given by libellant and the three seamen has been previously characterized as of little probative value on an issue of negligence.

"Here the witness was not qualified as an expert. The record discloses nothing as to his age, general experience at sea or particular experience as a boatswain. We understand a boatswain to be nothing more than a seaman who superintends the work by the crew. He is an intermediary who transmits orders from the master or mates to the crew. He is not required to be licensed. One who serves in such capacity does not thereby become a nexpert." *The Liberty Glo*, 1937 A.M.C. 111 (Delaware Supreme Court).

Even in commercial stowage of cargo, the master of the vessel is only required to use due diligence.

“The master of a vessel is bound to use due diligence and skill in stowing and staying cargo; but there is no absolute warranty that what is done shall prove sufficient.”

The Hornet, 58 U. S. 100, 17 How. 100, 15 L. Ed. 58.

It is submitted that there is not a scintilla of evidence justifying the lower court's findings of improper stowage of the smoke signal in the forepeak.

ESCAPE OF SMOKE SIGNAL AN INTERVENING CAUSE

It the court is of the opinion that negligent stowage has been proven, and Uzdadinis' testimony establishes negligence, then it is submitted that as hereinafter discussed under the basic rules of negligence, the act of negligent stowage is too remote an incident to be considered as the proximate cause of whatever injury appellee suffered at Attu. This would be due to a new, active and efficient cause, namely, the alleged kicking of a smoke signal container by Uzdadinis some weeks after stowage in the forepeak of the signal containers.

“An act which furnishes the opportunity for the infliction of an injury is not the proximate cause of the injury, where the latter occurs as the direct result of some intervening force. Thus where a negligent act

creates a condition which is subsequently acted upon by another unforeseeable, independent and distinct agency to produce the injury, the original act is the remote and not the proximate cause of the injury, even though the injury would not occur except for the act. In such a case the law being concerned with proximate rather than the remote cause does not look beyond the cause of injury most recently operative in determining liability for the injury." 38 *American Jurisprudence*, Sec. 68, p. 725.

The United States Supreme Court has announced and applied this rule in a number of cases, the leading case being *Atchison T. & S. R. Co. vs. Calhoun*, 213 U. S. 1, 53 L. Ed. 671, where the court said:

"Where in the sequence of events between the original default and final mischief an entirely independent and unrelated cause intervenes and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Louisiana Mut. Ins. Co. vs. Tweed*, 7 Wall 44, 52, 19 L. Ed. 65, 67. *This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor.*" (Italics ours.)

NO EVIDENCE TO SHOW WHAT CAUSED DISTRESS SIGNAL TO ESCAPE

As one of the links in the chain of alleged negligence set out in Article II of the libel it was requisite that appellee prove, by a preponderance of the evidence "*that a member of the crew of said vessel entered said forepeak for the pur-*

pose of obtaining gear, and while there negligently knocked or kicked over one of said smoke signal bombs, causing the escapement of a large quantity of gas, smoke and fumes."

(Italics ours.)

This burden is sought to be met by the extremely dubious and speculative testimony of Steven Uzdadinis, the sole witness for appellee on this ground of negligence, who testified by deposition (Aps. 167) so that this court has as good an opportunity as the trial court of appraising the witness' credibility and the probative value of his testimony.

TESTIMONY OF UZDADINIS

Uzdadinis testified he was a member of the crew of the S.S. "GEORGE FLAVEL" at the time of the escape of the smoke signal in the forepeak. (Aps. 168.) He stated he was sent to the forepeak for some tools (Aps. 169), and in his search passed from the forepeak aft into the carpenter shop where he observed several cases of smoke bombs stored. He then testified, on direct examination:

"A. I looked around, I rummaged around in those tools for a bit, in the tool case, and *I suppose* I happened to kick the first case that was right by me and then I left.

"Q. What was in the case that you kicked?"

"A. Well, *as far as I remember*, I noticed one occasion before that, I looked in that case and *I think* there

was one of the smoke bombs missing!" (Italics ours.)
Aps. 171, 172.)

He then stated he remained in the carpenter shop for fifteen seconds and then proceeded forward through the forepeak to the deck, then returned to No. 2 hold and lowered the tools. About five minutes later he claims he heard the call of "Fire." (Aps. 172.)

On cross examination, he testified as follows:

"Q. After going into one storeroom you went in the carpenter's room?

"A. Yes, I did.

"Q. And you couldn't find what you were looking for?

"A. That is right.

"Q. While you were down there you didn't take one of those smoke bombs out of a box, did you?

"A. No, I did not.

"Q. You didn't touch one of the smoke bombs, did you?

"A. I did not.

"Q. You did not pull the pin out of the smoke bomb, which would release the smoke?

"A. No.

"Q. You didn't handle the bombs in any way?

"A. I did not.

“Q. As I understand it, all you did was to give one of the boxes a kick?

“A. Well, there was one box I picked up, and I tossed it to the side a little more, and this one in particular, I just kicked it. Well, I kicked it enough so that it would move about roughly a foot, and probably went like that (illustrating). (138)

Mr. Levinson: You illustrated a sort of bouncing motion?

The Witness: Yes, I did.

“Q. (By Mr. Morrow): And nothing happened when you kicked it?

“A. No; nothing happened.

“Q. No smoke came out?

“A. No. the box was completely covered. I mean it still had its cover on.

“Q. As I understand, you were down there about a minute after you did that?

“A. Well, I was there in the carpenter shop about a minutes, yes—no, about fifteen or twenty seconds or so. Immediately after I kicked that I walked out of there, and then I took one more look around the forecastle.

“Q. And there was no smoke coming out of there at that time?

“A. No.” (Aps. 176, 177.)

He further testified:

“Q. Well, you didn’t notice any smoke there?

“A. I didn’t notice anything.

"Q. As a matter of fact, you thought you might have caused this?

A. Yes. I have always had that in mind.

"Q. You have had that feeling?

"A. Yes.

"Q. But there is really nothing at all which you can state which you definitely think caused that?

"A. Well, because of the fact if I kicked that, I immediately knew that there was smoke bombs in that case, and I kind of heard—or I mean I thought—I knew it was that, because I kind of heard that because the way the gas behaved, and I thought back a little before, and I remembered looking in that case, and I saw there were three of them in there instead of four, and one was missing. There may have been six, but I thought it was four in the case, so that is why I have always had the feeling that I caused it.

"Q. But you do not know that any one of those bombs emitted any smoke, do you?

"A. Well, yes, after they brought it up. I saw the can, and the can was exactly the type of can that I saw in that case. I knew it was a can like that.

"Q. You knew it was a can like that, but you do not know whether it was that particular can?

"A. No, I do not.

"Q. Or one of the cans in that particular case?

"A. No; I don't know if it was exactly one of the cans in that particular case. It may have been the case

that I tossed up. I mean I picked up a case and threw it maybe three feet away from me, upon top of another pile.

"Q. Or it might have been any other can down there in the forepeak?

"A. Yes.

"Q. That is right, isn't it?

"A. Well, it could be.

"Q. In other words, you do not know that you caused the gas to emit from any of those cans—you do not know it actually of your own personal knowledge, do you?

"A. No, I really don't know.

"Q. You did not know, either, whether one of the members of the amphibious force entered the forepeak after you were there?

"A. Well, I don't know, but I am sure—I always had the belief that I was the only one in that forepeak because of the circumstances involved. In other words, I did not think anyone had time enough to get up to the forepeak, or anything like that.

"Q. That is what you feel and think?

"A. That is what I feel and think.

"Q. And not what you actually know?

"A. No, I don't know, actually know it." (Aps. 178, 179 and 180.)

Summarized, Uzdadinis' testimony amounts to no more than his vague surmise and recollection that he kicked a carton containing smoke bombs "*roughly a foot*" and nothing developed. Some five minutes later after leaving the forepeak smoke was discovered there which was later proven to have come from a distress signal, removed from its container and the top of which had been manually unscrewed. There is no positive or convincing testimony that the supposed actions of Uzdadinis in kicking the carton, produced the escape of the smoke signal, nor that he actually kicked the carton container encasing the signal which escaped *There is no proof whatever that Uzdadinis or any other member of the vessel's crew removed the can from its case and unscrewed the top, the only act which could have permitted the signal to escape.*

There is a conflict of testimony between Uzadadinis and two other witnesses of appelle as to when the escape of gas was noticed after his visit to the forepeak. Peter Corvia said it was an hour (Aps. 209) while Robert T. Kenny thought it might have been ten minutes. (Aps. 351.)

Other testimonial facts indicate that Uzaddinis' supposed conduct had nothing to do with the escape of the contents of the smoke signal.

The discharged smoke signal, when recovered, was found not in the carpenter shop, where Uzdadinis claimed he may

have kicked the case of signals, but a considerable distance forward in the extreme forepeake, behind the ladder leading to the main deck. (Aps. 311, 312.) When recovered, the screw cap was missing (Aps. 332). Second Officer Seather testified after the escape of the signal, he examined the cases, and found one had been broken open and one of the smoke signals was missing from the case, which he assumed was the one which escaped.

Both Chief Mate Kristiensen and Second Officer Seather testified that a kick such as Uzdadinis claimed to have administered to the sealed carton containing the signals could not possibly dislodge the cap of any of the containers so that the contents would escape.

Kristiensen said:

“Q. It is possible if that cap had been loose that the jar or knocking it over would have loosened it and knocked it off? It is just a screw cap?

“A. Yes, it is a screw cap but it is not that loose. If they threw that carton all around, the cap wouldn't come off.” (Aps. 313.)

Seater testified similarly:

“Q. And if it is not put in tightly a jar would knock it out, wouldn't it?

“A. No; a jar would not knock it out. It would have to be loosened, and it is a screw cap.” (Aps. 378.)

Access to the forepeak was available at the time in question not only to the amphibious unit, which according to Uzdadinis' testimony still had their guns as well as distress signals stowed in the carpenter shop, but also to other members of the ship's crew. If Uzdadinis' testimony is to be given any credence whatever, after his alleged act of kicking the carton of signals "*a foot*," some unknown individual followed him into the forepeak, removed a container, brought it forward out of the carpenter shop to the ladder in the forward portion of the forepeak back of the ladder and there motivated by curiosity or otherwise, removed the cap and permitted the escape of the signal. No other reasonable inference can be made from the facts.

Uzdadinis himself frankly acknowledge he did not feel his supposed act of kicking the carton produced the subsequent escape of the distress signal. He testified:

"Q. Did you advise any one at that time what you had done down in the store room? The answer to this is first yes or nor, and then you can explain it.

"A. Well, yes I did.

"Q. Who?

"A. The only one was my buddy.

"Q. Did you advise anybody else?

"A. No. I felt more or less embarrassed and I thought I would be ridiculous from the fact I did such a thing,

that I was the cause of it. (Italics ours.) (Aps. 174, 175.)

Uzdadinis' testimony must be viewed in this further peculiar setting. The libel in this case was filed May 11, 1944. Appellee in his signed statement, (Appellant Exhibit A-1) (Aps. 155) on November 13, 1943, stated:

"I had no idea who pulled this plug out of the distress signal as there were 1,200 troops aboard, about 100 sailors, in addition to the crew of the vessel which numbered fifty men." (Aps. 156.)

The action was tried January 9, 1945. At the trial, appellee testified he did not learn the identity of the seamen who kicked the smoke signal at Attu, (Uzdadinis) *until November 7, 1944*. Yet appellee testified with minute particularity as to what tasks Uzdadinis was performing before he sent Uzdadinis forward for tools (Aps. 57) just prior to the escape of the signal. Kenney, appellee's witness, testified that after the escape of the distress signal at Attu, there was considerable discussion among members of the crew as to who caused it "and nobody knew" (Aps. 349). Uzdadinis testified similarly (Aps. 182). It is highly unreasonable to assume that if Uzdadinis has been sent forward just shortly before the escape of the signal in the forepeak, his claimed visit thereto was not associated by appellee nor by any member of the crew as a possible cause of the incident until *one year and five months later*.

ALLEGED ACTS OF UZDADINIS NOT FORSEEABLE

Before the alleged acts of Uzdadinis can be denominated as negligent it must appear that his conduct should have been reasonably foreseeable by the wrongdoer, (the officers of the vessel) at the instant of the wrong. Consequences which could not reasonably have been foreseen are not both natural and probable within the general test of proximate cause.

This court has recognized this rule in the recent case of *Sundberg vs. Washington Fish & Oyster Co.*, (1943) 138 Fed. (2d) 801 (C.C.A. 9), where the court said:

“Proof of negligence on the part of the shipowner involves at least a showing that under existing circumstances the shipowners or his agents should reasonably have anticipated the danger of bodily injury to a member of the crew. * * * citing cases.”

This rule has been uniformly applied by various Circuit Courts to Jones Act actions.

“There is no actionable liability for an alleged negligent act unless injury resulting therefrom could have been foreseen in the light of the attending circumstances. Indeed, it may be said that, in the absence of wanton wrong or some failure to conform to some arbitrary or absolute standard of care ‘foreseeability’ is a necessary test of the existence of negligence, and, if no injury can reasonably be expected to result, there is no negligence.”

Johnson vs. Kosmos Portland Cement Co., (C.C.A. 6) 64 F. (2d) 193.

“But we think the court committed a more fundamental error in not directing a verdict for defendant for want of substantial negligence in respect of both causes of action. In neither were facts shown which would lead the defendant to anticipate the danger of injury to its seamen by virtue of the existing condition of the ship’s appliances.”

Pittsburg S. S. Co. vs. Palo, (C.C.A. 6) 64 F. (2) 198.

“It was not an insurer, being liable only if the injury was reasonably foreseeable. It could not, however, have foreseen that libelant would walk into the pile of retarders just at the moment the lights went out. It follows that the court below was right in holding that there was no evidence of negligence imputable to respondent.”

Calmar S. S. Corporation vs. Taylor (C.C.A. 3) 92 F. (2d) 86.

Conceding *arguendo* negligent stowage of the distress signals has been proven it is submitted that no reasonable person could foresee the alleged act of Uzdadinis in kicking a carton container “one foot” could result subsequently in the escape of the contents of the container, which were securely packed and tightly stoppered, and stowed in a relatively inaccessible site in the forepeak.

It is respectfully submitted that in any event the testimony of Uzdalinis as to his relationship in effecting the escape of the smoke signal is based entirely on speculation

and conjecture and fails to establish his negligence by that standard of proof which the law demands, namely, by a preponderance of the evidence. For that reason the finding of the trial court was erroneous.

ARGUMENT ON SECOND ASSIGNMENT OF ERROR

- (2) The Court erred in making finding of Fact IV for the reason that said finding is not sustained by the weight of the evidence and is clearly erroneous. (Aps. 21.)

The finding of fact attacked reads as follows:

“That on or about the 15th day of August, 1943, a fire occurred in No. 3 hold of said vessel, and that in the course of his employment, the libelant entered said hold wearing a gas mask. That the members of the crew, in fighting said fire, negligently directed a host against libelant, striking him in the face and causing the gas mask to be thrown from his face, subjecting him to fumes, smoke and water, and aggravating a pre-existing condition; and that libelant was not contributorily negligent. (Aps. 15.)

THE KISKA FIRE

The facts concerning the occurrence of a fire in No. 3 hold of the S.S. “GEORGE FLAVEN” on the morning of the Kiska invasion, August 15, 1943, are undisputed. As stated by appellee in his signed statement (Respondent’s Exhibit A-1 Aps. 156) and corroborated by Second Officer Seather, (Aps. 368) the fire was caused when a “snow jeep” back fired, when two soldiers attempted to start it and the contents of the jeep, duffle bags, ignited. Chief Officer Kristensen confirmed this. (Aps. 292.)

A fire alarm signal was immediately rung. Wearing an Army gas mask, appellee descended No. 3 hold, to ascertain the cause of the fire. He remained below ten minutes. (Aps. 149.) As he started to ascend the ladder, he claims to have been struck in the face by a stream of water poured in the hold from the deck by some unknown seamen. (Aps. 149.) He claims his mask was knocked to one side by the impact, and was not restored to position until he had ascended the ladder to the deck, which took approximately *twenty seconds*. (Aps. 149.) He did not attempt to readjust his mask immediately, although he could have done so. (Aps. 150.) Appellee admitted he had no recollection of mentioning this incident to Mr. Belie of the Grace Line, whom he consulted in November, 1943, in San Francisco, when preparing a claim. (Aps. 153.) Nor is it referred to in the detailed damage claim he filed with John H. Black (Appellant's Exhibit A-1, Aps. 155). Appellee's witness, Uzdadinis, stated Lubinski wore his gas mask as he ascended the ladder. (Aps. 185.)

The individuals holding the hose, which, it is claimed, struck appellee's face, were subsequently identified as mess boy members of the crew by Peter Corvia. (Aps. 199.) He claimed he looked down from the deck to the hold of No. 3 hatch and witnessed the occurrence, despite the fact smoke was billowing out of the hold and obscuring vision. (Aps. 226.)

and conjecture and fails to establish his negligence by that standard of proof which the law demands, namely, by a preponderance of the evidence. For that reason the finding of the trial court was erroneous.

ARGUMENT ON SECOND ASSIGNMENT OF ERROR

- (2) The Court erred in making finding of Fact IV for the reason that said finding is not sustained by the weight of the evidence and is clearly erroneous. (Aps. 21.)

The finding of fact attacked reads as follows:

“That on or about the 15th day of August, 1943, a fire occurred in No. 3 hold of said vessel, and that in the course of his employment, the libelant entered said hold wearing a gas mask. That the members of the crew, in fighting said fire, negligently directed a host against libelant, striking him in the face and causing the gas mask to be thrown from his face, subjecting him to fumes, smoke and water, and aggravating a pre-existing condition; and that libelant was not contributorily negligent. (Aps. 15.)

THE KISKA FIRE

The facts concerning the occurrence of a fire in No. 3 hold of the S.S. “GEORGE FLAVEN” on the morning of the Kiska invasion, August 15, 1943, are undisputed. As stated by appellee in his signed statement (Respondent’s Exhibit A-1 Aps. 156) and corroborated by Second Officer Seather, (Aps. 368) the fire was caused when a “snow jeep” back fired, when two soldiers attempted to start it and the contents of the jeep, duffle bags, ignited. Chief Officer Kristensen confirmed this. (Aps. 292.)

A fire alarm signal was immediately rung. Wearing an Army gas mask, appellee descended No. 3 hold, to ascertain the cause of the fire. He remained below ten minutes. (Aps. 149.) As he started to ascend the ladder, he claims to have been struck in the face by a stream of water poured in the hold from the deck by some unknown seamen. (Aps. 149.) He claims his mask was knocked to one side by the impact, and was not restored to position until he had ascended the ladder to the deck, which took approximately *twenty seconds*. (Aps. 149.) He did not attempt to readjust his mask immediately, although he could have done so. (Aps. 150.) Appellee admitted he had no recollection of mentioning this incident to Mr. Belie of the Grace Line, whom he consulted in November, 1943, in San Francisco, when preparing a claim. (Aps. 153.) Nor is it referred to in the detailed damage claim he filed with John H. Black (Appellant's Exhibit A-1, Aps. 155). Appellee's witness, Uzdadinis, stated Lubinski wore his gas mask as he ascended the ladder. (Aps. 185.)

The individuals holding the hose, which, it is claimed, struck appellee's face, were subsequently identified as mess boy members of the crew by Peter Corvia. (Aps. 199.) He claimed he looked down from the deck to the hold of No. 3 hatch and witnessed the occurrence, despite the fact smoke was billowing out of the hold and obscuring vision. (Aps. 226.)

Robert Kenney, appellee's witness, likewise stated the smoke billowing out of the hold obscured vision. (Aps. 352.)

Appellee admitted that at the time he ascended the ladder, the crew members on the deck could only see him intermittently because of the impaired visibility. (Aps. 79.) Chief Officer Kristiansen said the smoke was so dense in the hold he did not recognize appellee if he were in the hold. (Aps. 317.) Second Officer Seather agreed with this. (Aps. 363.)

In response to the general alarm of "Fire" hoses were quickly strung up and played into No. 3 hold to extinguish the blaze. The only testimony of the purported negligence of the mess boys comes from Corvia. On direct examination, he testified two mess boys had directed the full pressure of the hose, which was too much for them to handle, down in the hold. (Aps. 199.) He stated he then went to their assistance and succeeded, with their help, in directing the stream away from appellee. (Aps. 217.)

He testified:

"Q. Were those mess boys able to control that hose?

"A. Oh, no, it was impossible. (Aps. 200.)

"Q. And the other men stood around and just let the mess boys pour water on Lubinski?

"A. Sure. They didn't do it intentionally. They just couldn't help it." (Aps. 217.)

The testimony revealed that the fire on the ship the morning of the Kiska invasion created a very grave and emergent situation because of the danger to munitions carried and everyone aboard was frantically engaged in subduing the blaze, which was eventually successfully accomplished. The circumstances surrounding the purported acts of the messman in handling the hose, as described by Corvia, fall far short of violating any of the acknowledged canons of negligence. Corvia admitted that the messmen were powerless to control the hose because of the pressure. These messmen cannot be charged with the extent of the pressure or the fact the hose was insufficiently manned. There is nothing to show that in the emergency they did not act reasonably.

It is well settled by the various Circuit Courts, that in acts of emergencies, persons are not held to the usual standard of care required.

Wabash Ry Co. vs. Walczak, 49 F. (2) 763 (C.C.A. Michigan).

Horton Motor Lines vs. Currie, 92 F. (2) 164 (C.C.A. V.A.).

In *Katoska vs. May Dept. Stores Co.*, 28 F. Supp. 3, the syllabus of the District Court of California holding is:

“One doing the best under the circumstances when confronted with a sudden situation should not be charged with negligence, even though it may appear that he might have acted differently if he had more time.”

FIRE AT SEA AN ASSUMED RISK

Cargo fires are of frequent occurrence at sea and their extinguishment one of the assumed risks of the perilous calling of a seaman as much as hazards of the weather or of the sea.

In *Arizona vs. Anelich*, 298 U. S. 110, 80 L. Ed 1085, the United States Supreme Court said:

“The seaman assumes the risk normally incident to his perilous calling.”

In *The Cricket*, 71 F. (2d) 61, (C.C.A. 9), this court said:

“The life of a seaman is hard. The nature of his calling subjects him to many dangers. The sailor knows this and assumes the risks incidental to his calling.”

It is submitted that the lower court’s finding of fact No. IV that appellee was injured at Kiska by the negligence of fellow seamen striking him with the force of the first hose has absolutely no factual basis and is clearly wrong.

ARGUMENTS ON THIRD ASSIGNMENT OF ERROR

- (3) The Court erred in making finding of Fact V for the reason that said finding is contrary to the weight of the evidence and is clearly erroneous. (Aps. 21.)

Finding of Fact V, which is attacked as having no evidentiary support in the record, reads as follows:

“That as a direct and proximate result of the negligence of respondent United States of America as aforesaid, libelant received a severe intraocular injury to the eyeball, resulting in a uveitis and an inflammatory condition between the iris and the lens, and that he has suffered a complete and permanent loss of vision to the left eye, and that there exists a potential danger to his right eye as a result of the injury to his left eye; that at the time of receiving said injury libelant was an able-bodied man, with good eyesight, of the age of 29 years, with a normal life expectancy of 36.03 years, and earning approximately \$500.00 per month as a seaman; that he was paid his wages to the end of the voyage of said vessel on the 28th day of September, 1943, and from said date to the 29th day of February, 1944, he was totally incapacitated from following any gainful occupation, and that his earning capacity has been permanently impaired; that he has suffered pain in the past, and now suffers pain on occasions from said eye; that he suffers humiliation and embarrassment by reason of the loss of sight in said eye and the necessity of wearing a covering on said eye; and that his total damage is the sum of \$17,500.00.” (Aps. 16.)

This assignment of error raises the question of whether appellee established by a preponderance of the evidence that either of the alleged acts of negligence at Attu or Kiska were the proximate causes of the development of the disease of iritis, or irido-cyclitis which destroyed the vision of appellee's left eye.

Appellee called as witnesses on this phase of the libel Dr. Paul Ziegler, a general physician, and U. S. Army Transport Surgeon on the S.S. “GEORGE FLAVEL,” who testi-

fied by deposition and Dr. Purman Dorman, a Seattle eye specialist, who testified as an expert witness.

Appellant called three physicians, Dr. James C. Schumacher, appellee's attending physician at the United States Marine Hospital, San Francisco, California, and as expert witnesses, Dr. Otto H. Barkan of San Francisco and Dr. James R. Morrow of Seattle. All of these witnesses testified by deposition.

NATURE OF IRITIS

The testimony is undisputed that iritis (which involves the iris, part of the inner structures of the eye), or iridocyclitis or uveitis by which this disease is referred to in the record when it involves inner structures of the eye adjacent to the iris, is an inflammation of the region of the iris, most commonly caused by systemic or bodily infection and occasionally by a violent trauma penetrating the external structures of the eye and damaging the iris. The inner structures of the eye affected by disease of the iris is revealed in Appellee's Exhibit A-9, being a cross-section of the human eye.

DR. ZEIGLER'S TESTIMONY

Dr. Zeigler stated he first treated appellee's left eye the latter part of August, 1943, (Aps. 500) and at no time did he treat both of appellee's eye-lids. (Aps. 503.) Appellee testified he visited Dr. Zeigler immediately after the smoke

signal escape at Attu on July 15, 1943, and both his lids were swollen. The only history of the onset of trouble in appellee's left eye given Dr. Zeigler was "he had been exposed to cold wind on the deck as well as dust and *possibly smoke.*" (Aps. 503.) (Italics ours.) It is to be noted this vague history of the onset of appellee's eye trouble differs materially from the allegations of negligence in his libel.

When he examined appellee's left eye, Dr. Zeigler stated he found no evidence of injury. He testified:

"A. The eye was inflamed, red, and had a conjunctivitis. There was some discoloration of the iris.

"Q. That is the pupil of the eye?

"A. The iris is the coloring in the eye.

"Q. At the time you made this examination did you observe any evidence of abrasion of the left eye-ball itself?

"A. I did not.

"Q. Did you observe any evidence of a foreign body in the left eye?

"A. I did not." (Aps. 501.)

Dr. Zeigler's diagnosis was appellee was suffering from conjunctivitis and iritis of the left eye with associated neuritis of the face. He admitted he was not equipped with adequate optical instruments to make a study of the structures of appellee's inner eye. (Aps. 501.) As a general practitioner

he was very reluctant to express any opinion as to the cause of appellee's blindness in his left eye. He testified:

"Q. For the purpose of this question, assuming the man had good eyes, would you then say that the smoke was the causative factor that brought the eye to the condition of a loss of vision?

"A. I don't know." (Aps. 513.)

DR. DORMAN'S TESTIMONY

Dr. Dorman testified he examined appellee, March 29, 1944, (Aps. 115) and also the day before the trial (Aps. 122). His examinations, made many months after the alleged exposures of June 15, 1943, and August 15, 1943, led him to conclude that appellee was suffering from an iritis of the left eye which had destroyed his vision. (Aps. 121.)

In response to a long hypothetical question as to the cause of the iritis, Dr. Dorman was of the opinion there was a possible connection between the alleged exposures and the iritis.

"The Witness: As the result of my examination and the taking of the history of the case, and in consideration that he had not had any eye difficulty previous to the date of July, 1943, I came to the conclusion that that injury that he had received to his eye was amply sufficient cause for the eye condition as I found it." (Aps. 125, 125.)

Dr. Dorman's answer indicated he considered the alleged twenty second exposure to the fire of No. 3 hold at

Kiska as of no consequence. On cross-examination, (Aps. 128) he said the Attu exposure was "the principal cause."

He admitted that the iritis could be due to a systemic condition. Yet he made no blood or x-ray tests or other tests to ascertain if a bodily infectious condition which could be discovered, was the cause of the iritis.

"Q. When Mr. Lubinski presented himself to you for examination, did you make any examination yourself by x-ray or otherwise to determine whether he was suffering from any systemic infection?

"A. No, I did not." (Aps. 138.)

The testimony of Dr. Dorman was most partisan and evasive. Despite the fact that appellee and all the witnesses has testified the Army gas mask which appellee wore at Attu was efficient and satisfactory. Dr. Dorman testified "it was not designed for this distress bomb." He had never seen it. (Aps. 130.) Dr. Dorman admitted he was not aware of the chemical constituents of the distress bomb, (Aps. 131) so obviously could not testify as to whether the signal when discharged at Attu possessed irritating properties to the internal chamber of the eye. He first admitted that "Fuchs' Diseases of the Eye" was "and excellent authority" (Aps. 135) in his profession, but then claimed its authoritative value had disappeared since Fuchs died in 1926. (Aps. 136.) Fuchs stated irido-cyclitis was only due to perforating injuries. (Aps. 135.)

At no place in his testimony did he testify he found any evidence of traumatic injury, penetrating or otherwise, to appellee's left eye.

His ultimate opinion that the alleged exposures to appellee's left eye *could* have produced iritis does not establish that it actually *did*. It is no more than the statement of one of several possible hypothesis.

TESTIMONY OF DR. SCHUMACHER

Appellants introduced the testimony by deposition of appellee's attending physician, Dr. James Schumacher, eye specialist at the United States Marine Hospital at San Francisco, California. He treated appellee from October 16, 1943, until February 9, 1944. (Aps. 462.) Previously Dr. Schumacher was professor of ophthalmology at St. Louis University. (Aps. 474.) Appellee at first vigorously objected to Dr. Schumacher's testimony on the grounds of privilege, but subsequently waived it. (Aps. 483.)

Dr. Schumacher stated when he first examined appellee he found him suffering from "Iritis, chronic, left eye," (Aps. 463) and treated him for that condition.

Dr. Schumacher stated he received the following history of the onset of the iritis given him by appellee.

"Q. Well, aside from the record, what is your recollection as to the history that he gave you?

"A. Well, the history which I took was that some-time in September, about, the patient was a little bit uncertain about it, but he said about September 7th, 1943, he was exposed to smoke and dust from the ship which caused an inflammation of his eye, his left eye." (Aps. 485.)

It is to be noted appellee gave no history of the Attu or Kiska incidents to Dr. Schumacher as the cause of his eye trouble. Subsequently, Dr. Schumacher testified, that a change was made by some other person in the hospital records showing the development of symptoms by appellee in his left eye as occurring in August, 1943. (Aps. 487.) This change in the records of the hospital was never explained.

Dr. Schumacher testified positively and unequivocally that the alleged exposures to the distress signal at Attu in July, 1943, or to the fire in Kiska in August, 1943, were not responsible for the condition of appellee's left eye.

"A. In my opinion, there is no relationship between the exposure to the smoke and the condition for which I treated him.

"Q. And will you explain why you have that opinion, Doctor?

"A. Well, iritis or iridocyclitis is an inflammation of the deeper tissues of the eye, and there are a limited number of things which cause it. The most common cause is some endogenous toxin, either a toxin as such, or a toxin from a disease, such as syphilis, tuberculosis, gonorrhea, or you can also get it from injuries; but the

injuries which do cause it have to be of a very severe nature, either a penetrating type of injury, or a very severe contusion of the eye are about the only things which will cause it.

“Q. Was there any history on the part of the patient, or from any other source that he had any such injuries which would be likely to cause or aggravate the condition of iritis or iridocyclitis?

“A. From the history that the patient gave me there was none.” Aps. 490, 491.)

Dr. Schumacher further testified that the alleged smoke exposures of Attu and Kiska would not aggravate an existing iritis in libelant's left eye.

“Q. Assuming these exposures to smoke caused some inflammation of the eyelids and irritation of the eyes, as smoke would, state whether in your opinion that exposure and those resulting conditions caused or aggravated the present condition of iridocyclitis?

“A. Well, the inflammation of the lids or the irritation of the eye caused by the smoke, in my opinion, would not cause the iritis or the iridocyclitis or aggravate the condition that was present before.” (Aps. 492, 493.)

As attending physician, Dr. Schumacher's views are entitled to unusual weight, especially since his professional background and the fact that he was testifying in the role of the impartial physician and as an employee of the United States Government bespeaks the integrity of his professional opinions and his lack of bias in reaching them.

TESTIMONY OF DR. OTTO BARKAN

The opinion of Dr. Otto Barkan, a distinguished eye specialist of San Francisco, California, accorded with the opinion of Dr. Schumacher. Dr. Barkan examined appellee November 26, 1943, and found him suffering from a chronic irido-cyclitis of the left eye. (Aps. 396.) Appellee gave him no history of the distress signal incident (Aps. 397) at Attu nor the fire at Kiska. (Aps. 398.) Dr. Barkan stated emphatically the alleged smoke exposures at Attu or Kiska neither caused nor aggravated appellee's iritis in his left eye.

"Q. Doctor, what is your opinion as to whether or not the condition of iridocyclitis in Lubinski's left eye which you found present in your examination was caused or aggravated by the alleged exposure to smoke or fumes of July 15th, 1943, at Attu, Alaska?

"A. I don't think that the condition could have been caused, precipitated or even aggravated by the fumes of the smoke as described.

"Q. Why not, Doctor?

"A. Because a condition of this kind is essentially an endogenous one. That is, it comes from an internal cause; and in my experience and in the literature, it would be precipitated by an external injury, such as a bruise or contusion of considerable severity.

"Q. Doctor, in your opinion, is the temporary inconvenience and discomfort produced by a person being

exposed to smoke such as Mr. Lubinski was of a sufficiently severe character to aggravate or accelerate an iridocyclitis?

"A. Not in my opinion." (Aps. 401.) * * *

"Q. Doctor, when you use the term "endogenous," do you mean some internal infection?

"A. Yes. (Aps. 402.)

TESTIMONY OF DR. JAMES R. MORROW

Dr. James Morrow, an eye specialist of Seattle, Washington, and chief eye consultant at the U. S. Marine Hospital at Seattle, Washington, testified in person as the result of an examination made by him of appellee June 20, 1944. Appellee gave him a history of the Attu incident but not of smoke exposure at Kiska. (Aps. 407.) Dr. Morrow testified there was no evidence of external injury to appellee's left eye. (Aps. 413, 414.) Like Drs. Schumacher and Dr. Barkan, he was unequivocally of the opinion appellee's iritis (Aps. 408) was not due to the Attu or Kiska incidents. (Aps. 420, 421.)

Dr. Morrow stated that there must be a penetrating injury of the external eye structures for a traumatic iritis to result and he found no evidence of such penetration in appellee's left eye which would have permitted infectious matters to be transmitted externally from outside the eye into the iris and adjacent structures. (Aps. 422, 423.)

Dr. Morrow further testified that the drainage of the eye was from the inner eye externally to the body (Aps. 414) which would militate against external infections or irritants being carried into the inner eye. Other than having a blood test made of Appellee which was negative (Aps. 428), Dr. Morrow made no detailed examination to ascertain the particular systemic condition which could have been responsible for appellee's iritis nearly a year prior to his examination. Dr. Morrow stated that it would not be medically possible to examine a person for every internal source of systemic infection which could produce an iritis. (Aps. 417.)

In its memorandum opinion in appraising Dr. Morrow's testimony, the trial court said, "The testimony of Dr. Morrow who testified in court carried great weight." (Aps. 11.)

LOWER COURT'S ERRONEOUS CONCLUSION

The trial court erroneously ignored the overwhelmingly preponderant testimony of appellant's medical witnesses that iritis is a systemic disease and can only be traumatic when there is a penetrating wound of the external surfaces of the eye permitting entry of external infectious sources into the inner chamber of the eye from without or a severe contusion of the eye-ball. Admittedly there was no evidence in the record appellee suffered any such injury. The court said in its memorandum opinion:

“It seems to me that, with the aid of modern medical tests, it could have been ascertained certainly whether or not the libelant had any infection in his system; but there was no proof of that at all.” (Aps. z11.)

The trial court completely overlooked the following testimony of Dr. Morrow:

“Q. Is it medically possible to determine the specific cause of each and every infection causing an iridocyclitis?

“A. No.” (Aps. 441.) (Aps. 436.)

Medical testimony is hardly necessary to establish that the functioning of the human body is so mysterious that even post mortem examinations frequently fail to reveal the cause of disease or death.

The trial court placed the burden of establishing the cause of appellee's disease of iritis upon appellant. This was erroneous. The burden of proof at all time rested upon appellee to prove by a preponderance of the evidence that the exposures at Attu and Kiska caused his iritis. He did not meet this burden by the testimony of Dr. Dorman, who only admitted the exposures were a *possible* cause. On this state of the record appellant should have been entitled to a non-suit without introducing its testimony. When it did so it established preponderantly by its medical testimony that the alleged exposures of Attu and Kiska could not have been

the causes of appellee's iritis. Hence, the court erred in entering Finding of Fact V and finding the alleged exposures were the proximate cause of the iritis.

ARGUMENT ON FOURTH ASSIGNMENT OF ERROR

(4) The Court erred in rendering the final decree which was entered herein on March 12, 1945, adjusting that the libellant was entitled to recover from respondent, United States of America, the sum of Seventeen Thousand Five Hundred Dollars (\$17,500.00) and his costs and disbursements in said action, for the reason that this portion of said decree is not supported by the weight of the evidence and is clearly erroneous.

For the reasons assigned in the Argument under Appellant's First, Second and Third Assignments of Error, the entry of the decree referred to in the Fourth Assignment of Error was clearly erroneous and the libel should be dismissed with prejudice.

CONCLUSIONS

We have the deepest sympathy for appellee in the misfortune he suffered in the loss of sight in his left eye. But as the United States Supreme Court said recently in the case of *De Zon vs. American President Lines*, 318 U. S. 660, 37 L. Ed. 1065, in denying a seaman's claim for injury:

"The loss of petitioner's eye is a serious handicap. But damages may be recovered under the Jones Act only for negligence. *Jamison vs. Encarion*, (281 U. S.

639, 74 L. Ed. 1084). Whether the legislative policy of compensating only on the basis of proven fault is wise is not for us to say * * *.”

As we stated at the outset of our brief, if the alleged exposures at Attu and Kiska caused appellee's iritis, it would appear that his claim could be asserted under the Second Seaman's War Risk Policy.

We respectfully submit that since appellee has not established by a preponderance of the evidence that appellant was guilty of negligence or that any proven negligence was the proximate cause of his damages, the decree entered by the trial court was erroneous and should be dismissed.

Respectfully submitted,

J. CHARLES DENNIS,
United States District Attorney,

BOGLE, BOGLE AND GATES
(Of Counsel)

Proctors for Appellant,
UNITED STATES OF AMERICA.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant.

vs.

WALTER LUBINSKI,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE
LUBINSKI

SAM L. LEVINSON
Proctor for Appellee.

1602 Northern Life Tower
Seattle 1, Washington.

FILED

MAY 19 1961

PAUL J. COHEN

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant.

vs.

WALTER LUBINSKI,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE
LUBINSKI

SAM L. LEVINSON

Proctor for Appellee.

1602 Northern Life Tower
Seattle 1, Washington.

INDEX

	PAGE
Appellee's Statement of the Case.....	1
A. On the question of negligence.....	1
B. On the question of appellee's loss of vision of his left eye as the proximate result of the negligent acts of appellant....	8
The Court's Decision.....	20
Argument in Support of Judgment.....	22
A. The findings of fact of the trial court are entitled to great weight with the appellate court.....	22
B. Negligence under the Jones Act is not to be given a restrict- ed meaning, but is to be liberally construed for the benefit of the seaman, who is still treated as a ward of the Ad- miralty Court	24
C. The evidence establishes that the appellant was negligent in permitting the smoke bombs to be stowed in the forecastle .	31
D. The evidence establishes that the act of Seaman Uzdadinis in kicking or throwing the smoke bomb was negligence.....	35
E. The appellant was negligent in supplying an insufficient gas mask to the appellee.....	37
F. Permitting the full force of the fire hose to strike Lubinski at the time of the second fire was negligence.....	40
G. The negligence of appellant is the proximate cause of the appellee's loss of sight in his left eye.....	41
Answer to Argument of Appellant.....	49
Conclusion	58

TABLE OF CITATIONS

	PAGE
Aquilar v. Standard Oil of N. J., 318 U.S. 274, 1943 A.M.C. 451.....	29
Beadle v. Spenser, 298 U.S. 124, 1936 A.M.C. 635.....	28
Burnstein, et al. v. U.S. (C.C.A. 9), 55 F. (2d) 599.....	25
Coates v. U. S. (C.C.A. 9) 59 F. (2d) 173.....	25
Cortes v. Balt. Insular Line, 287 U.S. 367, 1933 A.M.C. 9.....	26
Hume v. Moore-McCormack Lines, 121 F. (2d) 408, 1941 A.M.C. 1079.....	30
Jefferson Stand. Life Ins. v. Clemmer, (C.C.A. 4), 79 F. (2d) 724....	57
Johnson v. Griffiths S.S. Co. (C.C.A. 9) F. (2d) 1945 A.M.C. 887.....	31
Mahnich v. Southers S.S. Co., 321 U.S. 96, 1944 A.M.C. 1.....	31
Mardesich, et al. Anelich, 298 U.S. 110, 1936 A.M.C. 627.....	27
Matson Nav. Co. v. Pope & Talbot, (C.C.A. 9), 149 F. (2d) 205.....	22
Moore v. Tremelling (C.C.A. 9) 59 F. (2d) 173.....	25
O'Donell v. Great Lakes D. & D. Co., 318 U.S. 36, 1943 A.M.C. 149..	29
Pac.-American Fisheries v. Hoof (C.C.A. 9) 291 Fed. 306, 1923 A.M.C. 1180.....	31
Sundberg v. Washington Fish & Oyster Co., 138 F. (2d) 801, 1943 A.M.C. 1337.....	30
Southern Ry. Co. Prescott, 240 U.S. 632.....	57
The Diamond Cement (C.C.A. 9), 95 F. (2d) 738.....	31

STATUTES

50 U.S.C.A. 129.....	24
----------------------	----

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Appellant.

vs.

WALTER LUBINSKI,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

**BRIEF OF APPELLEE
LUBINSKI**

The question involved, being one of fact, the statement of the case is given in detail.

APPELLEE'S STATEMENT OF THE CASE

A.

ON THE QUESTION OF NEGLIGENCE*

This is an action for damages brought by the appellee, a seaman on the S.S. GEORGE FLAVEL, because of

* All emphasis in quotations, unless otherwise indicated, is supplied. References in (. . .) are to pages in Apostles on Appeal, unless otherwise indicated.

damages sustained, resulting in the loss of the sight of his left eye, by reason of the contact with escaping gas and fumes from a smoke bomb negligently stowed in the vessel's forepeak.

Appellee, Lubinski, a merchant seaman, joined the S.S. GEORGE FLAVEL as a boatswain at San Francisco in June, 1943. The S.S. GEORGE FLAVEL was a Liberty type vessel, and was operated by the appellant United States of America with the Alaska Steamship Company, as general agent. The vessel was manned by civilian merchant officers and crew, and was under the command of Captain Charles N. Goodwin (233). The cargo consisted of approximately 75% ammunition and military equipment, the balance being fuel and general impedimentia (234).

With this cargo were included certain smoke or signal bombs, part of the equipment of the landing barges which were stowed on the deck (235). Such bombs are ordinarily stowed in the life boats (302), and the bombs involved in this proceeding, which were part of the landing barge equipment, should have been stowed in the landing barges (302), which were then stowed on deck (275).

A considerable time after the vessel left San Francisco, and was in Alaskan waters (277), the mate, Kris-

tiensen, observing the smoke bombs on the deck (276) directed the crew to stow them in the forepeak of the vessel (279, 298, 302). The stowage of the smoke bombs in the forepeak of the vessel occurred with the direct knowledge and approval of the master (236).

The forepeak was open and members of the crew had access thereto (111, 236, 298). Normally the forepeak contained only the boatswain's and ship's supplies (53, 371,) and the men were constantly going in and out of the forepeak for that purpose (246, 298). The customary practice on merchant vessels prohibits the stowage of combustible materials in the forepeak where men are required to go for tools and equipment. Customarily, the proper procedure requires that such material be stowed in fireproof lockers or in a space where there is adequate provision to extinguish a fire, or to confine it if a fire occurs (53, 54, 55, 75, 141, 142, 144). A Liberty vessel such as the S.S. GEORGE FLAVEL has a steam smothering system in the holds, but there is no such system in the forepeak (55).

All of the testimony was to the effect that it was the primary responsibility of the ship's officers to see that the cargo was properly stowed with relation to the safety of the vessel and the crew (75, 142, 145, 246, 247, 249, 296, 371).

There is no dispute that the smoke bombs were placed in the forepeak at the order of the first mate and with the knowledge and approval of the master.

Not only was the stowage of smoke bombs in the forepeak of the vessel contrary to the customary and safe practice with relation to the stowage of combustible material, but this was directly contrary to Coast Guard regulations, which were in effect at that time, relating to the stowage of ammunition and combustible material.

Exhibit 2, the Coast Guard Regulations, dated October 1, 1943, was offered but refused (99), although Exhibit 3, which is the Coast Guard Regulations dated October, 1942, was offered and admitted (99). Appellant's brief, page 22, erroneously gives Exhibit 3 as bearing the date of October 1, 1943. The admitted exhibit was in effect at the time involved in this proceeding.

These regulations, Exhibit 3, were a comprehensive series promulgated for the safety of ship and crew in the handling and stowing of ammunition and dangerous cargo. These regulations define pyrotechnics, and provided for the stowage of such items at designated places. It is appelle's position that the definitions include smoke bombs. Stowage in the forepeak is permitted only if the forepeak contains no vessel's stores and can be closed off from traffic at sea (Ex. 3, Secs. 146.29-30-5, Aps. 101). These regulations also provide that it shall be the responsibility of the master to assign a deck officer to be in constant attendance at the

loading, to see that the provisions of these regulations were properly met.

The lower court found that negligence was clearly established in the stowage of the smoke bombs in the forepeak and that this was so, regardless of any regulations (9).

On July 15, 1943, the S.S. GEORGE FLAVEL was lying at Attu, Alaska. Appellee and other seamen were engaged in repairing gear in No. 2 hold. A seaman, one Uzdadinis, was sent into the forepeak to obtain some tools. The cases and material in the forepeak were tossed about in a disorderly condition (170), and while looking for the tools, Uzdadinis tossed aside a case containing smoke bombs (177, 179) and then returned to the hatch with the tools and proceeded to lower them with a line into the hold (173). Just about this time, a cry of "fire" was heard (172). Uzdadinis rushed forward and saw a great amount of orange smoke pouring out of the ventilator (173). No one was in the forepeak when Uzdadinis was there immediately before the fire (180). Although the amphibious crew had been using the forepeak for the purpose of overhauling some of their gear, they had finished their work about two weeks before the fire (112) and as a matter of fact, all of the troops were already off the vessel (219).

A general alarm was given and appellee, as first in command of the emergency squad in the absence of the first mate who was not there at that time (59), rushed to the scene of the fire, gave orders to break out the fire fighting equipment. Immediately aft of the forepeak was the magazine in which ammunition was stowed (6). The crew were worried over the situation (342) as a great amount of heat in the forepeak would blow up the entire ship (61). Lubinski donned a gas mask given him by Kristiensen (309), and was the first to go below into the smoke to search for the cause of the fire (309). Lubinski went down several times, and later one or two other members of the crew went down for the same purpose.

The smoke and fumes emerging from the forepeak were of a distinctive orange color (63, 193). Although the mask was supposed to fit snugly over the face, when Lubinski's mask was removed, evidence of the smoke fumes appeared on his face. The smoke left an orange powdery-like residue on his face, and this was apparent under his gas mask (195, 196, 197, 211, 343), and the fumes seemed to lay on Lubinski's face. When the mask was removed the first time, he was rushed over to the side to get some air as he was gagging (195, 212).

The fire was brought under control about forty-five minutes after the alarm was sounded and after great amounts of water were poured into the hold. Later, the

charred remains of the smoke bomb which caused the fire were found in the forepeak.

The vessel continued on from Attu and was part of the flotilla in the Kiska invasion, and on August 15th was lying near the beachhead, having begun discharge of soldiers and supplies. About ten o'clock in the morning, fire broke out in No. 3 hatch and the alarm sounded. Lubinski was in his room at the time (68), and he immediately proceeded to his station in the performance of his duties, donned a gas mask, and proceeded below in No. 3 hold. While there was smoke billowing out of the hold, it was sufficiently clear so that those standing on deck could generally see the ladder (69, 79, 227). As Lubinski started to emerge from the hold, and mount the ladder, he was struck in the face by the force of a deck hose which was being played on the fire below by two members of the steward's department. He came out of the hold soaking wet (175, 185), and was yelling to try to get the man to divert the stream away from him (200), as the force of the hose was full on his face and knocked aside the mask which he was wearing when he entered the hold (79, 200).

B.**On the Question of Appellee's Loss of Vision of His Left Eye as the Proximate Result of the Negligent Acts of Appellant.**

All parties agreed that at the time of the trial, the vision of Lubinski's left eye was permanently destroyed.

At the time Lubinski joined the vessel, he was twenty-nine years of age and in perfect health (83). Approximately two months prior to his joining the S.S. GEORGE FLAVEL, his eyes were examined for the American President Lines and were declared perfect (84). He had never had trouble with his eyes. He had also had his eyes examined in 1941 or 1942, when he sought to join a vessel of the Moore-McCormick Lines, and they were again pronounced all right (89). In the very brief cross-examination of Lubinski by proctors for appellant United States of America, it was brought out that Lubinski had had frequent blood tests, between ten and fifteen, and all were negative (161). Lubinski was called on rebuttal to testify as to specific illnesses or diseases suggested by the various doctors as a possible cause for the loss of sight, and specifically testified that he had never had syphilis, sinus trouble, trouble with his teeth, rheumatism, that he had had between fifteen and twenty blood tests since 1935 with negative results, that he had had x-rays taken of his

body for the purpose of determining possible disease with negative results (520), and that never had any disease or illness other than a localized soft chancre, the same as a pimple, and an appendectomy (521).

This action was started on May 19, 1944 (8). Prior thereto, a statement giving the substance of his claim was filed by Lubinski on November 13, 1943, with the office of John Black, the insurance lawyer (163), and at the request of John Black's office, Lubinski was examined by Dr. Otto Barkan on November 26, 1943 (396), who submitted a written report to Mr. Black (403), and whose purpose was to set forth his views relating to the injury of the eye and the exposure to the fumes (403). On the 2nd day of March, 1944, a formal claim in writing was made with the appellant United States of America (5), and his oral discovery deposition was taken on the 20th of May, 1944. The case came on for trial January, 1945. No evidence was offered contradicting or challenging appellee's statement that he was in perfect health when he joined the vessel.

When Lubinski came up from the forepeak the first time, after he had gone below to find the cause of the fire (66), his clothes were covered with an orange residue of the smoke. Lubinski noticed it on the bare parts of his face and neck, and it burned his eyes very badly (66). Immediately after the occurrence of the fire, he

reported to the doctor, who washed his eyes out (67). He thereafter went below and did not turn to again until one o'clock the following morning, and before turning to, he felt very sick. Five or six days later, both of his eyelids were very badly swollen, which condition continued for two or three days (67). His left eye began to bother him. It was aching and getting very sore (68), like a toothache. Although the doctor on the ship treated the eye every day by washing his eye and putting salve on it (68), it grew steadily worse and was badly inflamed. During the eight or nine days following the incident of the fire in Kiska on August 15, 1943, Lubinski was in pretty bad shape (80), and the doctor was giving him hypos to ease the pain in his eye.

Upon arrival of the vessel at Adak, he was sent ashore to the navy hospital by the master of the vessel, for the purpose of consulting Dr. Kaven, an eye specialist (503). Dr. Kaven, at that time, found that there were keratitic deposits on the posterior cornea surface and the iris appeared muddy (491, 492).

Lubinski returned to the vessel and was again examined by an eye specialist upon the arrival of the vessel in Honolulu (81), and was then advised to return to the United States for treatment. The vessel arrived in Seattle about September 23, 1943, and from Seattle Lubinski went to his home in San Francisco,

and thence to Salt Lake City to consult his own physician. The latter advised him to return to San Francisco to the Marine Hospital for treatment, which he did (82).

Lubinski was an in patient at the Marine Hospital for three weeks, and an out patient for four months to the 9th day of February, 1944. During his in patient treatment, he received a complete general physical check-up, x-ray of his lungs, and prostate and massages and complete tests (83). His complete hospital record showing these examinations were filed in the proceeding by the appellant United States of America (477), and nothing appears therein, or was called to the court's attention by appellant, that would indicate that Lubinski ever suffered or then suffered from any systemic disease or illness.

Appellee's testimony as to his condition, and the effect of the fumes were amply corroborated by other members of the crew. Kenney testified (343) that when Lubinski came out of the hold, the orange powdery-like residue from the fumes was on his face under the gas mask; that these fumes burned Kenney's throat and his eyes were burning. Kenney knew that Lubinski had trouble with his eye immediately following the fire (345), and his own eyes and throat burned for several hours after the fire. A sailor named "Smokey"

complained about his eyes for two or three weeks after the fire (345).

Uzdadinis testified Lubinski complained about his eyes a day or two after the fire (176, 186), and that some other person on the ship had trouble with his eyes (182). Although Uzdadinis smelled the gas for only a second as it came out of the ventilator, and while he was in the open air, he felt it in his throat (183). According to this witness, it was obvious that Lubinski was having trouble with his eye (188).

Corvia testified that when Lubinski came up he took his gas mask off to get some air, and at that time the smoke was all over his face and Lubinski was rushed over to the side to get some air (195). At that time Lubinski complained how his face and eyes burned and his eyes started to water and he was gagging (196, 212). Corvia himself went to see the doctor because he was gagging as a result of getting a mouthful of smoke (196). Where the fumes came into contact with Corvia, they burned and stung (202). At that time, Lubinski's eyes were bloodshot and very watery (197), and during the rest of the voyage his eyes were pretty bad, they were always bloodshot and he always had to have a handkerchief or a piece of rag or waste to his eyes because of their condition (198, 202, 224, 225). Lubinski complained that his eyes hurt him constantly (226), and they were in the same condition when he

left the ship (226). For at least two weeks after the incident of the forepeak fire, Lubinski went to the doctor at least twice a day (198).

The first mate, Kristiensen, also testified as to the effect of smoke or fumes, stating that they had a terrible smell and made him sick (287, 288), and that Lubinski complained about his eyes (294, 295).

Appellee's loss of vision was due to an iritis in its severest form, called iridocyclitis, or an inflammation of the iris, resulting in adhesions between the iris and the lens of the eye. All of the doctors who testified agreed that the cause of this condition was either exogenous, a cause outside of the eyeball, i. e., a blow or injury, or endogenous, a cause within the human system, some infection within the body, causing the inflammation (Dorman, 134, Barkan, 401, Morrow, 415, 421, 430, Schumacher, 491, Ziegler, 508, 509).

Two of the doctors testified in person before the court.

Dr. Dorman, who testified on behalf of Lubinski, is an eye specialist who has been certified by the American Board of Ophthalmology (113), who has studied in Vienna, and who is the eye physician for the Federal Vocational Rehabilitation Program and a member of the National Society for the Prevention of Blindness, who has given several courses in connection with the

eye to various organizations and students (114, 115, 134, 136). He examined Lubinski on two occasions, the first on March 29, 1944, and the second a day before the trial on January 8, 1945.

Dr. Morrow, called by the appellant United States of America, is a member of the Puget Sound Academy of Ophthalmology and chief consultant and ophthalmologist at the Marine Hospital at Seattle, and examined Lubinski on June 20, 1944 (406) at the request of the proctors of appellant United States of America.

The other doctors called by the appellant United States of America all testified by deposition. They were Dr. Schumacher and Dr. Barkan. Dr. Barkan's testimony was taken without benefit of cross-examination.

Dr. Paul Ziegler, the physician on the vessel and the one who actually attended Lubinski, also testified by deposition, which deposition was taken on behalf of the appellant United States of America. At the time of the trial, appellant failed to introduce or offer Dr. Ziegler's deposition in evidence, and it was thereupon offered and introduced by appellee as part of his case in chief (497) after appellant had rested, pursuant to a motion to re-open his case for that purpose.

Dr. Dorman testified, without qualification, that the exposure to the chemical fumes of the smoke bomb

was the proximate cause of Lubinski's eye condition (125, 127, 128). This irritation set up a process within the eye which resulted in the loss of sight.

Dr. Dorman testified as to the personal history given him by Lubinski and the result of his two examinations with reference to the condition of his eye, indicating in some detail the nature of the examination. He found that the vision of the left eye was limited to light perception only (119), which was the first step of complete and total blindness. This was due to a swelling of the lining membrane of the cornea (120), causing the iris to bulge forward and increasing the intra-ocular pressure. This is a condition found only in a severe type of iritis, the devastating, destructive type of iritis (121).

In comparing the results of the two examinations which he had made, the first in March of 1944 and the second a day before the trial in January, 1945, he found that there had been some changes in the eye in that the iris was becoming thin and atrophic from lack of use (122), and that Lubinski was wearing a cloth patch over his eye because the eye had become sensitive to cold and temperature changes. This might cause a spasm of the vessels, and a pain which might retreat to that side of the head (123).

Dr. Dorman testified that it was his conclusion that the injury which Lubinski had received to his eye was amply sufficient cause for the eye condition as he found it (125).

It was also his experience that when an iritis is due to an endogenous cause, such endogenous cause being systematic, the infection causes an involvement of both eyes. If it involves one eye first, as it frequently does, the other eye is involved usually after but a short lapse of time (125). In view of the fact that some eight months had lapsed between the two examinations which he had made of Lubinski, the time was sufficient to have allowed for an involvement of the second eye in the event that the iritis was of an endogenous origin. It was his opinion that Lubinski's present eye condition could very easily and most likely have been the result of the injury which Lubinski sustained in July, 1943 (127).

On cross-examination, he re-stated his position that the origin of the eye condition was the exposure to the smoke bomb (128) and that the irritating properties of the chemical or gas in the smoke was apparent from the fact that it was irritating not only to the eyes, but to the nose and throat (131), and that the moisture of the surface of the eye probably combined with the irritant to set up a chemical reaction (139).

Dr. Paul Ziegler was the physician on the vessel. As above indicated, he was first called by the appellant United States of America. He testified that Lubinski first came to him complaining of intense pain in the left side of his face and an inability to see clearly from the left eye (500). He had no ophthalmoscope on the vessel and for that reason was unable to make a complete and thorough examination of the structures of the interior of the eye. He did, however, find that the eye was inflamed and red, and that there was a conjunctivitis. He also found some discoloration of the iris (501). He treated Lubinski by giving him a hypodermic to relieve the pain and irrigated the eye and used an ointment. Although this relieved the pain, the symptoms of the eye were very little improved and at that time he had light perception only (502). Smoke irritation as a possible cause was called to his attention at the time (503), although the matter of damage to the external part of the eye was difficult to determine because of the accompanying conjunctivitis (503), Dr. Ziegler did suggest to Lubinski that he have himself examined physically as the condition might be the result of some systemic source. At that time Lubinski also had an irritation of his sinuses, which he treated (504).

On cross-examination, he testified that at the time he examined him in the latter part of August, even by

a cursory examination the eye condition was obvious and easily apparent (506), and if such condition existed when he joined the vessel, it would have been readily apparent. In response to a direct question (508), he stated that there was possible probability that some external irritation could have caused the condition which he found in Lubinski's eye. As far as Dr. Ziegler was able to ascertain, Lubinski was apparently in good health when he examined him at that time (510), and he had no systemic condition. At that time, Lubinski gave no history of any systemic condition. He admitted that if the irritant was strong enough to irritate the mucous membrane of the nose and sinus, the eye would be more likely to receive a more severe irritation (515, 516), and that such irritation might set up a secondary condition within the eyeball, because of the activity set in motion by the irritation of the surface (516).

Dr. Schumacher testified on behalf of appellant United States of America by deposition. His testimony was that Lubinski was under his care and the care of the United States Marine Hospital in San Francisco from October 16, 1943, to February 9, 1944. Dr. Schumacher had with him, in response to a *subpoenae duces tecum*, the entire hospital record and report of Lubinski's treatment (488). At the time the deposition was read in evidence at the trial, the hospital record was

introduced as Exhibit 12 (477). Upon Lubinski's entry into the hospital, the hospital diagnosis was a chronic iridocyclitis of the left eye (488). The only history Dr. Schumacher obtained was an exposure to smoke and dust, which caused the inflammation to Lubinski's eye (485). In response to a question by attorneys for the appellant United States of America, Dr. Schumacher gave as his opinion the cause of the condition of Lubinski's eye to be a toxin from an endogenous disease and from injury (491). No place in this examination nor in the hospital record was there any suggestion of any endogenous disease suffered by Lubinski, although complete and thorough examinations were given him. Nevertheless, Dr. Schumacher gave as his opinion that from the history he had received, he did not believe there was any relationship between the exposure to smoke and Lubinski's eye condition.

Dr. Barkan examined Lubinski on November 26, 1943, at the request of the office of Mr. John Black. This examination was made for the purpose of a report to Mr. Black, the attorney for the insurance carrier, and was not made for the purpose of any treatment (403). Dr. Barkan took a history of an exposure in July, 1943, to smoke and fire, followed by swollen eyelids for some ten days and subsequent reduced vision of the left eye (397). At that time, Lubinski attributed

his condition entirely to the July, 1943, incident at Attu, (398). In response to the question as to whether the exposure caused the condition, he stated as his opinion that this was not the cause, because such condition is essentially endogenous and would be precipitated only by an external injury, such as a bruise or contusion of considerable severity (401). There was no appearance on behalf of the libelant at the time of the taking of the deposition and the testimony of Dr. Barkan was without benefit of cross-examination.

In the hypothetical question submitted to both Dr. Barkan and Dr. Schumacher, the nature and extent of the exposure were not given, nor was the fact directed to their attention, nor were they asked concerning the fact that there was no record of any systemic disease in any of the many examinations taken by Lubinski. Nor were they asked to consider that his personal history was entirely negative of any systemic disease.

THE COURT'S DECISION (8)

After hearing the testimony and seeing the witnesses, the court felt that negligence in the stowage of smoke bombs was clearly established, referring to the fact that the bombs were removed from the deck and stowed in the forepeak among the ship's stores. Whether there were any regulations relating to stowage or not, it was obvious to the court that the stowage

of smoke bombs as these in the forepeak, where the containers might be disturbed by persons rightfully using the space and if ignited the smoke and gas would escape from the containers and remain confined in the forepeak space, created a danger which might foreseeably result in harm to some person rightfully going into the forepeak space (9).

The court was convinced by the evidence that Lubinski's eyes were injured at Attu by smoke and gas from the smoke bombs negligently stowed in the forepeak of the vessel (10).

The court also found that Lubinski had made out a case of negligence on the incident of the Kiska fire (10), and that the injuries received by Lubinski on that occasion aggravated the condition resulting from his injuries received at Attu a month earlier.

The court went into and discussed the medical testimony, and commented on the fact that although appellant's medical testimony was to the effect that the injury sustained by Lubinski on board ship did not cause the damage, it was less convincing, because that same testimony offered no proof of any systemic condition or any cause different from that asserted by Lubinski (11), and there was some medical testimony tending to support Lubinski's contention that the smoke bomb injury, aggravated by the water and smoke at Kiska, caused his eye trouble.

The court had in mind this testimony and the examination given Lubinski in an attempt to find the cause of his eye condition, when it commented on the fact that with the aid of modern medical tests and examinations given to Lubinski it could have been certainly ascertained whether Lubinski had any infection in his system; but there was no proof of that at all (11).

The court commented that the testimony of Dr. Morrow carried great weight (as appellant so carefully sets out in its brief on page 53), but continued:

“but it failed of that convincing power necessary to a conclusion in favor of the theory of systemic infection which his testimony supported.” (p. 11).

Dr. Morrow did not testify, nor did any other witness state, that there was any systemic infection to cause the loss of appellee’s left eye (12).

The court concluded from a consideration of all of the testimony, lay as well as expert medical, that the injury to Lubinski’s eye was caused by smoke and attendant gas injury, and the court felt so convinced by the preponderance of the evidence in the record.

ARGUMENT IN SUPPORT OF JUDGMENT

A.

THE FINDINGS OF FACT OF THE TRIAL COURT ARE ENTITLED TO GREAT WEIGHT WITH THE APPELLATE COURT.

As set forth in the case of *Matson Navigation Co. v. Pope & Talbot*, (C.C.A. 9), 149 F. (2d) 205, the rule is well established that where the testimony in the court

below is partly oral and partly by deposition, the weight to be given to the findings of the trial court is a matter for the sound judgment of the appellate court.

In the case at bar, seven witnesses testified as to the facts concerning the acts of negligence, and of these seven witnesses, the libelant and one witness, Kenney, testified orally before the court. The testimony of the others was introduced by deposition. Where the trial court had before it the principal actor in the controversy, Lubinski, and could observe this testimony, the important nature of this testimony require that the lower court's findings of fact, based upon such oral testimony, be given great consideration by this court and carries substantial weight.

On the question of proximate cause between the negligent acts and the loss of sight in Lubinski's eye, a direct issue was presented to the trial court by the two doctors who testified. These doctors were both questioned by the trial court. The trial court had the benefit of seeing and hearing Lubinski on this issue as well as one of the lay witnesses, Kenney. As appears from the court's decision, the trial court resolved the direct conflict of evidence of the expert opinion in favor of the Libelant, Lubinski. On this issue, therefore, the findings of the trial court are entitled to great weight in this court.

Certainly, sufficient witnesses appeared before the trial court, both in numbers and importance, with relation to the issues before the trial court, as to place the trial court in better position to pass upon the credibility of the facts testified to by these witnesses. The trial court had the benefit of seeing and hearing them testify, and under these circumstances, even though some witnesses testified by deposition, in the exercise of this court's sound discretion, the findings of the trial court must carry great weight with this court.

B.

Negligence Under the Jones Act Is Not to Be Given a Restricted Meaning, but Is to Be Liberally Construed for the Benefit of the Seaman, Who Is Still Treated as a Ward of the Admiralty Court.

Aside from the question of weight to be given to the trial court's finding which we feel is determinative of the issues, re-examination of the evidence *de novo* will support no other conclusion than that announced by the trial court.

Although some question was raised below, and is suggested here, that war conditions and the fact that the cargo was originally stowed by the army, in some way affects appellant's liability, this position is apparently abandoned by the appellant. Appellant cites 50 U. S. C. A. 129 (App. Brf. 13), wherein it is set forth

that the Jones Act is made available to war-time merchant seamen in cases of negligence.

Also abandoned by the appellant is the issue of a claim by Lubinski on a war risk policy. The failure of such defense has not been assigned as error. It was not pleaded in the court below, nor was any evidence introduced in support of the suggested issue, and no argument is made thereon by the appellant United States of America in its brief.

Burnstein, et al. v. United States, (C. C. A. 9) 55 F. (2d) 599.

Coates v. United States, (C. C. A. 9) 59 F. (2d) 173.

Moore v. Tremelling, (C. C. A. 9) 100 F. (2d) 39, 43.

This is an action under the Jones Act. It is an action brought by a seaman on a vessel against his employers for an injury sustained as the proximate result of the failure of his employers to perform their duties toward him.

The measure of that duty and the question of the breach thereof, with relation to the facts of this case, must be determined within the framework of the legislative and controlling judicial pronouncements which define it. These pronouncements call for an approach and a rule of interpretation by the court as the trier of

the facts, which is an essential and integral factor in the determination of the issues. In other words, in the interpretation of the facts, this Court must interpret the issues so as to bring its decision within the spirit as well as the legislative letter of the law, and consider its decision as a part of that legislative purpose to build a free and independent, and therefore a sound, merchant marine. The term "ward of the admiralty", is not a meaningless phrase. Apparently the appellant recognized the same approach, as it refers to the traditional liberality of Congress when legislating for seamen. (App. Brief, p. 13).

This court must also determine the issue of negligence in accordance with the historic attitude of admiralty courts when treating problems involving seamen. In determining that issue, this Court must treat the libellant here as a ward of the admiralty court.

This doctrine and approach has been strengthened and affirmed by unequivocal pronouncements of the Supreme Court of the United States. In *Cortes v. Balt. Insular Line*, 287 U S. 367, 1933 A. M. C. 9, an action under the Jones Act, which incorporates the Federal Employers' Liability Act, involved the definition of negligence, the court, speaking through Mr. Justice Cardozo, states:

"The conditions at sea differ widely from those on land, and the diversity of conditions breeds

diversity of duties. This court has said that 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.' *Robertson v. Baldwin*, 165 U. S. 275, 287. Another court has said: 'The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited.' *Scarff v. Metcalf*, 107 N. Y. 211, 215. Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection." (p. 14).

In the more recent case of *Mardesich, et al. c. Anelich*, (usually referred to as the "Arizona"), 298 U.S. 110, 1936 A.M.C. 627, the court again reviews the liability established under the Jones Act, within the setting of the admiralty system. In holding that the defense of assumption of risk, which was allowed under the Federal Employer's Liability Act (since then removed by Congressional enactment) did not apply to actions by seamen by reason of the historic admiralty principles with relation to seamen's rights, speaking through Mr. Justice Stone, the court states:

"Like considerations, and others to be mentioned, require a like conclusion with respect to the modified and in some respects enlarged liability imported into the maritime law by the Jones Act. The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Cf. *Chelentis v. Luckenbach SS. Co.*, *supra*. Its provisions, like

others of the Merchant Marine Act, of which it is a part; are to be liberally construed to attain that end, see *Cortes vs. Baltimore Insular Line*, 287 U. S. 367, 375, 1933 A. M. C. 9; *Jamison vs. Encarnacion*, 281 U. S. 635, 639, 1930 A. M. C. 1129; *Alpha S.S. Corp. v. Cain*, 281 U. S. 642, 1930 A. M. C. 1133; *Warner vs. Goltra*, 293 U. S. 155, 157, 160, 1934 A. M. C. 1436, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part." (p. 634).

In a companion case which follows the "Arizona," *Beadle vs. Spencer*, 298 U. S. 124, 1936 A. M. C. 635, the court rejects an attempt to limit an admiralty doctrine for the benefit of seamen, which was developed as a result of sea service, under the peculiar facts involved in that case. There the vessel was tied to the dock when the injury occurred. This is again indicative of the point of view of approach which is an integral part of this case:

"Nor do we perceive any adequate ground for judicial relaxation of the admiralty rule, applicable under the Jones Act, that assumption of risk is not a defense to a suit to recover for injury to a seaman resulting from unseaworthiness or defective equipment, because he chances to be in some measure less amenable to the iron discipline of the sea than others who go upon foreign voyages. Even so his freedom to avoid the risk is far from comparable to that of the employee on land where the defense of assumption of risk originated and has been maintained. No such distinction appears to have been recognized in the maritime law. And we discern nothing in the purpose or in the language of the Jones Act or in the rules of liability

which it prescribes to suggest that Congress undertook to introduce such a distinction into the maritime law." (pp. 637, 638.)

It is significant that the trend of the decisions of the Supreme Court of the United States relating to seamen have been to enforce and enlarge their initial rights, which is consistent and within the spirit of the doctrine that seamen are wards of the admiralty court. For example, *O'Donnell vs. Great Lakes D. & D. Co.*, 318 U. S. 36, 1943 A. M. C. 149, holds that the rights of a seaman arise from his status as such, and, therefore, an action could be maintained under the Jones Act, even though the injury took place on land.

In *Aguilar vs. Standard Oil of N. J.*, 318 U. S. 274, 1943 A. M. C. 451, the court allowed a recovery for maintenance and cure for an injury occurring on shore leave. This decision by Mr. Justice Rutledge, amply supported by legal precedent, exemplifies the traditional approach to problems relating to seamen. Though the problem there was one relating to maintenance and cure, we quote a portion of the decision showing that approach:

"Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf." (p. 461).

This Court is squarely in line with this rule of interpretation. In *Sundberg v. Washington Fish & Oyster Co.*, 138 F. (2d) 801, 1943 A. M. C. 1337, this Court is quoted as follows:

“The United States Supreme Court treated the subject of negligence for which a seaman can recover in *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 377, 1933 A. M. C. 9. We quote briefly from the opinion: ‘The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs.’

“In discussing the Federal Employers’ Liability Act in an action involving injuries to a stevedore, the Supreme Court declared, *Jamison vs. Encarnacion*, 281 U. S. 635, 640, 1930 A. M. C. 1129: ‘The Act is not to be narrowed by refined reasoning or for the sake of giving “negligence” a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted * * *.’” (pp. 1338, 1339).

The liability for damages imposed upon respondents by the Jones Act, as interpreted by the maritime courts, has been created by Congress for the protection of seamen. The facts of each case must be examined with

¹Mr. Justice Frank of the Circuit Court of Appeals for the Second Circuit, in the case of *Hume v. Moore-McCormack Lines, Inc.*, 121 F. (2d) 408, 1941 A. M. C. 1079, has examined the relationship of a seaman and his vessel historically, and attempts to discover the rationale of the decisions. The opinion develops the consistent judicial policy relating to seamen, and significantly suggests that this policy was based on requirements of national defense. We quote from the opinion:

that purpose in mind, and must be liberally interpreted to effectuate that purpose.

C.

THE EVIDENCE ESTABLISHES THAT THE APPELLANT WAS NEGLIGENT IN PERMITTING THE SMOKE BOMBS TO BE STOWED IN THE FORECASTLE.

The appellant owes a continuous and nondelegable duty to the appellee to supply a safe place to work. A similar duty exists to supply a seaworthy vessel, and this relates not only to the construction of the vessel itself, but the manner of the stowage of cargo for the intended voyage.

Johnson v. Griffiths S. S. Co (C. C. A. 9) Fed. 2d—1945 A. M. C. 887.

Pac-American Fisheries v. Hoof (C. C. A. 9) 291 Fed. 306, 1923 A. M. C. 1180.

The Diamond Cement (C. C. A. 9) 95 Fed. 2d 738. 1938 A. M. C. 757.

Mahnich v. Southern S. S. Co. 321 U. S. 9, 1944 A. M. C. 1.

“With that in mind, we should note an intensely practical influence (especially meaningful for us today) sharply manifesting itself in the early 19th century admiralty decisions relating to seamen, which may give us the answer to our question: there is an explicit recognition of the importance of sea-power as an agency of commerce and of national defense.” (p. 1095.)

The evidence is uncontradicted that the customary practice on merchant vessels prohibits the stowage of combustible materials in the forepeak, where the men are required to go for tools and equipment. That this customary practice is in accord with the standards of reasonably prudent operation of a vessel, is apparent without further argument.

The customary and proper procedure requires such materials to be stowed in fireproof lockers, or in a space where there is adequate provision to extinguish a fire automatically, or to confine it if a fire occurs. (53, 54, 55, 75, 141, 142, 144.) The witnesses also testified that it was the primary responsibility of the ship's officers to see that no materials of this nature were stowed in the forepeak. And yet, the first mate of the vessel, John Kristiensen, testifying on behalf of the respondents, stated that the smoke bombs were placed

“For all that, this point remains: One of the impulses which apparently contributed to the survival of the admiralty doctrine as to seamen was vigorously reenforced by early 19th century events affecting both England and this country. And that stimulus still has vitality. See *Calmar S. S. Corp. vs. Taylor*, 303 U. S. 525, 528, 1938 A. M. C. 341, where the court (citing *Harden vs. Gordon*) speaks of “The maintenance of a merchant marine for the commercial service and *maritime defense of the nation* by inducing men to accept employment in an arduous and perilous service.” (p. 1096.)

“The legislative policy has been to extend that unique protection; in order to effectuate the Con-

in the forepeak at his orders. (279, 298, 302.) This was done long after the vessel left San Francisco and was in Alaskan waters (277), which still more enfeebles appellant's attempt to avoid responsibility by inferring that the Army directed the loading of the vessel in San Francisco. Furthermore, the captain of the vessel further authorized the placing of this dangerous cargo in the forepeak (236). While Captain Goodwin later testified that the mate was in charge of the stowage of the cargo in the forepeak (246), he stated he did not even know that the smoke bombs were aboard the vessel at the time (247). Sather, the second mate, testified that normally the forepeak should contain only the possum's supplies (371). All of the foregoing, of course, are appellant's witnesses, and the men primarily responsible for the safety of the vessel and the crew.

Not only was the stowage of the smoke bombs in the forepeak negligent by being contrary to good seaman-

gressional intention, statutes of that type have been liberally construed to favor the seaman (*Bainbridge vs. Merchants and Miners Transp. Co.*, 287 U. S. 278, 1933 A. M. C. 32), who has been called the "ward of the legislature." That the legislative policy, in turn, should perhaps affect the judicial attitude, even as to matters not completely within the boundaries of a statute, was suggested by Mr. Justice Holmes, on Circuit, in *Johnson vs. United States*, 163 Fed. 30, 32 (1 CCA, 1908), recently cited and quoted with approval in *Keifer & Keifer vs. R. F. C.* 306 U. S. 381, 391, note 4 (1939)." (pp. 1097, 1098.)

ship and the customary practice, but such stowage was in direct violation of the regulations of the Coast Guard and Steamboat Inspection Service relating to the stowage of dangerous cargo.

The applicable regulations in effect at that time, were introduced as appellee's Exhibit 3; a comprehensive series of regulations promulgated for the safety of the ship and crew in handling and stowing dangerous cargo. Despite appellant's half-hearted objection that these regulations did not apply because smoke bombs are not technically ammunition, the court properly overruled the objection and permitted the introduction of the exhibit. Definitions, as set forth in the exhibit, clearly indicate that the bombs involved are covered by the regulations. (Exhibit 3, Definitions 146.25-5, p. 1).

Should there still remain any question concerning the responsibility of the ship's officers for the proper stowage of these bombs, such responsibility is unequivocally established by these regulations, wherein it is provided as follows:

“During the entire operation of loading ammunition, ‘it shall be the responsibility of the master to assign a deck officer of the vessel, who shall be in constant attendance. It shall be this officer's responsibility to see that the provisions of the regulations in this part, in so far as such provisions apply to the vessel, are complied with.’” (Ex. 3, Sec. 146.29-27 p. 6.)

The regulations provide that pyrotechnic stowage shall be given ammunition stowage, (Ex. 3, Sec. 146.29-44 p. 11), as described in Sec. 146.29-42 (Ex. 3 p. 11), which, in turn, provides for stowage in locations as provided in Sec. 146.29-30 (Ex. 3 p. 7). This section permits the stowage of such cargo in a forepeak only under certain conditions:

“a forecastle, poop or permanent deck house, provided the space is ventilated, and does not contain any ‘in use’ crew accommodations, nor vessel stores, and can be closed off from traffic while at sea.”

Violation of a statutory provision is negligence as a matter of law. It is undisputed that the forepeak did not meet this requirement; it was not closed off from traffic while at sea, it contained vessel stores and was in constant use. The very risk and danger to which this regulation was directed, that of setting off these bombs or starting a fire while someone was looking for stores or supplies or worked about the forepeak, occurred. Appellant's negligence on this point cannot be denied, and the evidence leaves no room for any other conclusion.

D.

THE EVIDENCE ESTABLISHES THAT THE ACT OF SEAMAN UZDADINIS IN KICKING OR THROWING THE SMOKE BOMB WAS NEGLIGENCE.

In actions under the Jones Act, the “fellow servant” doctrine is abolished. The employer is, therefore, liable

for acts of the fellow servant in the course of his employment. The acts of seaman Uzdadinis when he went into the forepeak to get tools for the boatswain, was negligence. He knew that the smoke bombs were stored in the forepeak. The bombs were thrown about in a disorderly condition (170). While looking for his tools, he carelessly kicked a case containing some bombs (171), and tossed it aside. He testified on cross-examination that he tossed one case approximately three feet (177, 179). About four or five minutes after this occurrence, the fire was discovered (172). This latter fact was also corroborated by the testimony of the witness Kenney. The simple statement of these facts shows them to be thoughtless and negligent. That the witness himself felt that he was a causative factor of the fire which followed is readily understandable from the fact that no other person was in the forepeak between the time he was there and the time the fire was discovered (174, 178, 180).

Although there is some suggestion that the armed guard may have been responsible for setting the fire, all the evidence indicates they had left the vessel. The witness Corvia indicated in his deposition that the armed crew had already left the vessel (219).

Appellee Lubinski also testified that the amphibious crew were all through working at the time of the fire (112).

Appellant seems to lay some stress upon the fact that the cap to these bombs was a screw cap, although one of the witnesses testified it was a clip cap. Such facts are wholly immaterial, as the bomb did in fact ignite, and appellant does not dispute this fact. The argument or inference that someone, whoever it may have been, unscrewed the cap means absolutely nothing as far as appellant's liability is concerned. There was a fire with disastrous consequences to appellee, and the fire was caused by a smoke bomb, which should not have been stowed in the forepeak.

The acts of Uzdadinis was in the chain of causation of the negligent acts which caused appellee's injury. No other conclusion can follow from the evidence.

E.

THE APPELLANT WAS NEGLIGENT IN SUPPLYING AN INSUFFICIENT GAS MASK TO THE APPELLEE.

Appellee, as boatswain, was second in command in the disaster or emergency squad. The first mate was first in command. As such, appellee testified that it was his duty to go below, at the time of the first fire, to ascertain the cause of the fire. It was necessary to enter the forepeak at that time. Appellee testified he did not recall whether he was ordered below by the mate, although the witness Kenney testified definitely that the mate ordered Lubinski to enter the forepeak. The

witness Corvia also testified that it was the mate who sent Lubinski below (221). There is no dispute that the first mate was present. As a matter of fact, he testified that Lubinski was given his gas mask (309). The second officer further testified that he helped Lubinski on with the gas mask (372).

Considering the dangerous nature of the cargo, 75% ammunition (234), and that some of it was immediately aft of the forepeak bulkhead, there can be no question but that Lubinski was in the performance of his duty, in the highest sense of the term, in entering the forepeak. His conduct is not to be measured from hindsight and with knowledge of the cause of the fire, but is to be measured by the circumstances at the time he entered the forepeak, alone, with a dense volume of smoke coming therefrom, and where at that time there could only be speculation of the cause and the extent of the fire.

The vessel was carrying inflammable cargo, including chemical bombs of various type. The availability of adequate gas masks to fight the particular type of fire that might occur, considering the nature of the cargo, was the obligation of the ship's officers and operators. Any old type of gas mask, or one that failed to protect the surface of the skin, was not sufficient. There is ample evidence in the record that the gas mask supplied to Lubinski was inadequate. Corvia testified

that when the gas mask was removed from Lubinski, smoke or fumes appeared to lay on his face; that they could be seen because of the distinctive orange color (195, 211), and that Lubinski was rushed over to the side to get some air (195). Lubinski was gagging when the mask was removed from his face. The witness Kenney also testified that the fumes were apparent on Lubinski's face when the gas mask was removed (343). These were old army gas masks (223). There was some evidence by Capt. Goodwin (245) that there were larger gas masks on the vessel, although there is no explanation of why they were not available, or why Lubinski was handed the old army gas mask by the mate. Even the first mate, Kristiensen, testified that the use of the gas mask made him feel as though he were sick (287, 288).

The fact that the second mate used another gas mask, supplied him by a member of the crew (325), and that he testified he felt no ill effects, although he had to come up for a breathing spell (326) does not affect the inference that the one supplied to Lubinski was defective, particularly in the absence of evidence that the masks used by Sather and Lubinski were similar.

Appellant attempted to establish by cross-examination that the gas mask was one of the newer type with a mouthpiece which was inserted in the mouth of the wearer. Appellee, however, testified directly to the con-

trary, that it was the older type of mask with a flutter valve in the base (147).

As gas masks are properly part of the vessel's equipment, improper or insufficient gas masks renders the vessel unseaworthy. As such, they come within the non-delegable and absolute obligation of the vessel to supply seaworthy equipment to meet the needs of the particular voyage. Failure to supply such a gas mask is negligence.

F.

PERMITTING THE FULL FORCE OF THE FIRE HOSE TO STRIKE LUBINSKI AT THE TIME OF THE SECOND FIRE WAS NEGLIGENCE.

Lubinski was in his room at the time the second fire broke out at Kiska on August 15th (68). When the alarm was given, he immediately proceeded to his station, and in the performance of his duties, donned a gas mask and proceeded below in No. 3 hold. While there was smoke billowing out of the hold, it was sufficiently clear so that those standing on deck could generally see the ladder (69, 79, 227). Under these conditions, the men holding the hose were negligent in permitting the full force of the water to strike Lubinski in the face as he was proceeding up the ladder and dislodge the mask he was wearing. There seems to be no dispute but that Lubinski was struck by the water from the hose at the time. Uzdadinis testified that he

saw the boatswain come out of the hold soaking wet (175, 183). Corvia testified that he heard someone yelling and that a couple of mess boys had the nozzle right down on the boatswain. He testified the boatswain was on the ladder coming up, and that the force of the hose was full on his face (200), and that his mask was knocked to one side. Corvia further testified that there were other men standing around while the mess boys held the hose (217), and that if the two men were unable to control the hose, certainly some of the others should have assisted them.

Under the foregoing circumstances, it was negligence to permit the full force of the hose to strike Lubinski in the face, and the trial court's finding on this issue is sustained by the evidence.

G.

THE NEGLIGENCE OF APPELLANT IS THE PROXIMATE CAUSE OF THE APPELLEE'S LOSS OF SIGHT IN HIS LEFT EYE.

Upon one fact, all of the medical testimony is in agreement, and that is that at the time of the trial, appellee had a total loss of sight in his left eye. The loss of sight was due to an iridocyclitis, or an inflammatory adhesion between the iris and the lens. This condition is permanent.

All of the medical testimony further agreed that the cause of such a condition is never spontaneous, but that it is due to some systemic infection or from some outside cause or trauma. The trial court had the benefit of hearing two doctors, Dr. Dorman on behalf of appellee, and Dr. Morrow on behalf of appellant. The other doctors called by the appellant all testified by deposition. Dr. Barkan's testimony was without benefit of cross-examination, and Dr. Zeigler, the attending physician of appellee on the vessel, although called on behalf of appellant, after the deposition was taken, appellant refused to offer it in evidence, and it was offered by appellee.

Dr. Dorman testified without qualification, that the exposure to the chemical fumes of the smoke bomb was the proximate cause of appellee's eye condition (125, 127, 128). This injury set up a process within the eye which resulted in the loss of sight. The trial court heard and saw this witness, and there can be no question as to Dr. Dorman's qualifications and the correctness of his opinion. Dr. Dorman had no hesitancy in agreeing with the other medical testimony that a systemic condition within the body could be the cause of the condition, but, in the absence of any evidence of such systemic condition, and appellee's testimony that he had none, it must be concluded that the exposure to the irritant fumes of the smoke bomb was the cause.

The trial court knew, with the facilities available to the appellant, that if the appellee was not telling the truth when he stated that he did not have, and never had had, any of the diseases or illnesses which might be the systemic cause of his eye condition, that appellant would have introduced evidence to the contrary. Appellant had ample opportunity to do so if this was a fact. Appellant did in fact introduce appellee's complete hospital record of the United States Marine Hospital at San Francisco (Ex. A-12). *That record establishes conclusively that appellee did not have any of the diseases which appellant's physicians testified might cause the condition.* Appellee's blood tests, a whole series of them, were negative; the x-rays were negative; his teeth were in excellent condition; and appellee was in excellent health except for the loss of vision. Appellee testified specifically that he never had any of the diseases which were suggested by appellant's doctors as the cause of his loss of vision (520, 421). By the process of elimination, every possible systemic condition that may have caused his loss of vision is shown not to exist. The conclusion is therefore inescapable that the one remaining factor, the injury sustained on the vessel, is the proximate cause of his loss of vision. The opinion of appellant's physicians that the injury did not cause the loss of vision is simply not supported by the facts in the record under their own testimony of causation.

Nor is such opinion buttressed by the lame statement of Dr. Morrow that he did not know what caused libelant's condition in the absence of evidence of systemic disease, but he still did not believe that the injury described was its cause. He admitted under these circumstances that he did not know what was the cause of libelant's eye condition. He did testify, however, that it would be possible for some infection to pass the Canal of Schem, the nerves or open sluiceway close to the surface of the eye, and felt that the eye condition was probably caused by some severe inflammation which followed.

Dr. Dorman's conclusion is amply supported by the evidence. Appellee testified, and it cannot be denied and was not disputed, that he had eye examinations many times prior to the time he joined the vessel (84, 89), and that at the time he joined the vessel he had excellent eyesight, 20-20. Appellee's testimony of irritation to the eye during the period immediately following the fire (66), the immediate treatment on the vessel and care by the vessel's doctor (67), the prognosis of his eye condition during that time (67, 68, 80), the report and treatment by the navy doctor when the vessel arrived in Adak (503), the treatment in Honolulu (81), and the examination and treatment when the vessel returned to San Francisco (83), leads with-

out question to the conclusion that the injury was the causative factor.

Appellee's testimony is corroborated by the testimony of other witnesses. The witness Kenney testified that immediately following the first fire, appellee had trouble with his eye and that he observed his condition—that appellee's eyes were bloodshot, watery and a source of complaint by appellee (345). He also testified that one of the other crew members, a man called "Smokey," also had considerable trouble with his eyes following the fire (345). Kenney went below into the forepeak only once, and as the result of this one exposure his eyes watered and his throat burned (343). Every other member of the crew who came into contact with the gas had similar reaction.

Uzdadinis testified (176, 186) that appellee complained about his eyes a day or so after the fire. Appellee complained and was having trouble with his eye during the voyage (181, 186), and one of the other men had eye trouble (182, 184), and that Uzdadinis felt the irritation in his throat (183). According to this witness, it was obvious that Lubinski had trouble with his eyes (188). At that time appellee stated to the witness that his eye trouble was related to the smoke in the forepeak (189).

Corvia testified that the smoke got all over appellee's eyes and face, and appellee at that time exclaimed how

it started to burn his face and his eyes to water (196, 212). Corvia himself inhaled a mouthful and it caused him to gag and he immediately reported to the doctor (196). Corvia established the bloodshot condition of appellee's eye immediately following the forepeak fire and the continuation of this condition during the remainder of the voyage, and that appellee always had a handkerchief or a piece of waste up to his eyes (198, 202, 224, 225). He also corroborated the fact of appellee's visits to the doctor aboard the ship for treatment (198). Corvia testified that the gas was of such a nature that even a short exposure on the body caused a burning or stinging sensation which lasted quite a while (202). From the date of the fire to the end of the voyage, Lubinski was always having trouble with his eyes; they were always bloodshot and watering, and he required attention for them.

On cross-examination, Corvia testified that when appellee's gas mask was removed he was rushed to the rail and he was gagging, and in the vigorous language of a sailor was complaining of the burning of his eyes (212). An hour after the fire Corvia noticed the condition of appellee's eyes, and they were pretty bad. They were bloodshot, watering (197), and appellee complained about them, and that this condition continued (198).

The first mate, Kristiensen, appellant's witness, also testified as to the effect of the smoke or fumes, that they made him sick, had a terrible smell (287); that appellee complained about his eyes (294, 295).

It was appellant's own witness, Dr. Ziegler, medical officer on the vessel, who supplies the testimony that establishes the casual connection beyond any question. When Lubinski first reported for treatment, he complained of intense pain on the left side of the face, and an inability to see clearly from the left eye (500). The eye was inflamed and red and discoloration was then apparent in the iris (501). Dr. Ziegler gave him an anesthetic for the pain in the eye, which helped the pain but did very little to improve the symptoms of the eye (502). At the time of this visit, Lubinski already had very little vision, which is entirely consistent with the opinion of Dr. Dorman and of the other doctors who testified as to the length of time required for the development of the condition after the injury. Ziegler realized the seriousness of appellee's eye condition, and sent him ashore to an eye specialist when the ship arrived at Adak (502). Even at the time of the first examination, Dr. Ziegler thought it might be possible that the external injury could be the cause of the condition of the eye, although it was difficult to tell because of the accompanying conjunctivitis or inflammation of the lids (503). He also suggested a search for a

systemic cause. Dr. Ziegler further testified that the eye condition was obvious and apparent when he first saw it (506), which is positive corroboration of appellee's testimony that his eyes were in good condition when he joined the vessel. If appellee's eyes were in the same condition when he joined the vessel as they were the first time Dr. Ziegler saw them, it would have been immediately apparent. Dr. Ziegler frankly admitted on cross-examination that with the meagre methods of examination available to him, it would have been possible probably that some external irritant condition could have started the situation (508). He had no hesitancy in testifying that this smoke could have been the causative factor of appellee's eye condition (512, 513, 515). He further testified that he packed Lubinski's sinuses in an attempt to alleviate an irritation of the sinuses, and that smoke sufficient to irritate the mucous membrane of the sinus would have a stronger effect on the mucous surfaces of the eye (516).

Appellant in calling the witness vouches for his integrity. Witnesses are apparently called to establish the facts. The refusal of the appellant to introduce Ziegler's testimony after taking his deposition, certainly permits a strong inference against appellant as to its good faith in presenting all of the facts to the court.

The facts are conclusive. Appellee's loss of sight is permanent, and the cause is either systemic or the result of some external injury to the eyeball. The evidence directly negatives the existence of any systemic condition. There is in the record competent medical testimony that the gas and smoke irritation, as established by the evidence, is sufficient and in all probability did cause the condition.

Without any question concerning the credibility of witnesses who testified before the trial court, this evidence is conclusive that the cause of the loss of Lubinski's vision was the negligence of the appellant. No other conclusion is possible.

ANSWER TO ARGUMENT OF APPELLANT

Appellee's answer to the argument of appellant is largely a discussion of the facts. We shall direct the court's attention to what we feel is the proper answer to the evidence cited or referred to by the appellant, without repeating appellee's argument on the merits.

One of the points made by the appellant was that the cargo was originally stowed by the army (App. Brf., p. 15). We fail to see the materiality of this fact, even assuming it to be true, with the issues involved in this appeal. The undisputed fact is that the smoke bombs were removed from the deck after the ship was at sea, and placed in the forepeak long after the stowage

and loading of the cargo was completed. Whether the cargo was stowed in San Francisco by the Army, was stowed by some private stevedoring company, or by John Jones, has not the remotest relevancy to the issues involved. If the appellant seeks to establish an inference from the fact that the cargo was stowed by the Army that the ship's officers were thereby absolved of all responsibility on the part of the vessel, the testimony of the vessel's officers contradicts this (246, 249, 296), as well as the specific provisions of the Coast Guard regulations, which places upon the officers of the vessel the responsibility of seeing that the dangerous cargo is properly stowed (101).

Appellant makes the argument that it was necessary to stow these signal bombs in the forepeak in order to keep them from deteriorating (App. Brf., p. 17). This argument simply ignores the fact that these signal bombs were part of the equipment of the landing barges, which were stowed on deck, and gives no explanation why they were not stowed within these landing barges. Furthermore, if the vessel's supply of tarpaulins had been adequate, as testified to by the first officer, Kristiensen (298, 299, 300), they could have been covered and left on deck and not stowed in a narrow, confined space. While the officers of the vessel may have wished to cooperate with the Navy amphibious crew, as the appellant suggests, by providing a

place for them to work on their guns (App. Brf., p. 19), in so far as the record appears, work on these guns had absolutely nothing to do with the smoke bombs and the fire at Adak. Appellant does not even make a direct argument on this point, and seek to raise an inference by inuendo.

We do not know upon what authority appellant makes the argument that smoke bombs are not ammunition. Certainly a distress signal of a chemical nature, which is ignited by exposure to the air is as much ammunition as a bomb that is ignited by percussion. The fact that upon ignition the bomb gives forth a smoke or gas, instead of a sudden expanding explosion does not change its character. By the same type of reasoning, a poison gas bomb would not be ammunition. Whatever these distress bombs may be called, their dangerous character is apparent. It is a fair inference that they come within the definition of pyrotechnics in the Coast Guard Regulations. The custom on merchant vessels in connection with the stowage of combustible materials, even paint, indicates the care that must be taken at sea when handling such material.

On the argument made by appellant on the admissibility of the Coast Guard Regulations, appellant erroneously refers to Appellee's Exhibit 3 as being dated October 1, 1943. As a matter of fact, the record shows that Exhibit 3 is dated October 1, 1942 (99), and it was

the prior exhibit, Exhibit 2, which was a subsequent issue of these same regulations, which was dated October 1, 1943, and which was not admitted in evidence. No question can arise as to these regulations being in effect in the summer of 1943 when the vessel was loaded.

The argument made by appellant on the admissibility of the Coast Guard regulations ignores the plain definitions as set forth in the regulations. The very statute cited by appellant, on page 13 of its brief, wherein it is provided merchant seamen employed on Government vessels during war time have the same rights for the enforcement of a claim for personal injuries as "If the seamen were employed on a privately owned and operated American vessel," completely disposes of any argument or objection that this vessel may have been a so-called public vessel and thereby relieved of the obligations imposed by the regulations.

We direct this Court's attention to the fact that the lower court found that there was negligence, whether these regulations were involved or not (9).

Appellant's remaining argument on Finding of Fact III is an attack upon the appellee's expert witnesses on stowage and on the acts of the witness Uzadinis while in the forepeak immediately preceding the fire. These arguments simply state conclusions without any support in the record. On the first point, that of the expert

witnesses on stowage, it is significant that appellant did not call or produce a single witness to the contrary. In the light of the record on this point, the lower court had no alternative but to find that due diligence was not used in the stowage of smoke bombs.

Appellant's argument that the acts of Uzdadinis are an intervening cause and as such cannot be charged to the appellant, because his acts are not foreseeable by the officers, simply ignores the provisions of the Jones Act, which appellant admits governs this case.

It cannot be denied that Uzdadinis was a fellow-servant, and his entrance into the forepeak and actions therein, were in the course of his employment. As such, he is the agent of the employer, the appellant, who is responsible for his acts which result in injury to the appellee.

The principals who are ultimately responsible are not the officers, but the employer. The appellant employed both the officers and the crew, including Uzdadinis and the appellee. No citation of authority is necessary to support this proposition.

Nor is the summary of the testimony of Uzdadinis, as set forth in page 32 of appellant's brief, supported by the extracts of the testimony of Uzdadinis as set forth in appellant's brief. Appellant summarizes the testimony of Uzdadinis that he kicked the carton con-

taining the smoke bomb roughly a foot, and blandly ignores the testimony set forth on page 31 of its brief, where Uzdadinis states that he picked up the case and threw it perhaps three feet on top of another pile.

Whether Uzdadinis' acts be negligence or not, the primary negligence was the improper stowage of these smoke bombs in a place where there was a reasonable likelihood that they would be disturbed or ignited because they were stowed in "in-use" quarters, where the crew were constantly going in and out of the forepeak during the voyage. If through some cause, be it negligent or otherwise, these bombs were ignited by reason of their improper stowage, their effect would be greatly aggravated and become an unnecessary danger to men who might be required to go into the fore-castle for the purpose of fighting the fire. They would thereby constitute a great hazard to the vessel and the personnel. The exercise of ordinary care would avoid such hazards to the ship and the personnel.

The lower court, in its memorandum decision (10), answers the argument of appellant on the Kiska fire, when it states "the standard of ordinary care is sufficient to require a fellow crewman to so manipulate a water hose as not to knock from the face or out of position on the face of his fellow employee a gas mask under the circumstances involved at Kiska." There can be no dispute that this is what occurred, as this is the

only testimony of the members of the crew who actually observed the incident as well as the appellee. The ship's officers testified that they did not see what occurred. The court found that these acts of negligence aggravated the injury received in the Attu fire.

It is indeed an astounding statement which appears on page 42 of appellant's brief, that fire at sea is an assumed risk. It is not surprising, therefore, that the two cases cited by appellant in support of this statement have no relevancy to this statement. No further comment is necessary.

The third assignment of error, that the court erred in finding that the appellee's loss of vision was the proximate result of appellant's negligence, has been thoroughly discussed heretofore as part of the appellee's affirmative argument in support of the judgment. To attempt to answer appellant's argument on this point would be but a repitition of the argument heretofore made.

Nor do the isolated excerpts from the testimony of the doctors cited in appellant's brief fairly support the conclusions urged by the appellant.

It is significant that the appellant does not deny that the cause of the iritis is one of two: an injury or the result of some endogenous disease. Appellant makes the erroneous conclusion that the lower court placed

the burden of establishing the cause of the condition upon the appellee, and by inference urges that the appellee has not met the required burden of proof. Appellant entirely overlooks the direct testimony of the appellee that he has always been in good health, that he has been examined and x-rayed time and time again, with negative results, and that there was direct expert testimony that the circumstances of the injury were sufficient to cause, and in all probability did cause, his present condition. Furthermore, it appears from the evidence that the appellee had been under the care of one of the physicians called by the appellant, and time and opportunity had been given and utilized by this physician in an effort to ascertain the cause of appellee's eye condition, other than the injury complained of. These efforts were entirely unsuccessful, and the hospital records introduced by the appellant were entirely negative of any finding of any cause of the loss of vision of appellee's eye. The court had this in mind when it announced its decision relating to the failure of the appellant to prove with the aid of modern medical science any other cause for the loss of sight than the established negligence. Such pronouncement by the court was not placing the burden of establishing the cause of appellee's condition upon appellant, but was a statement of the rule requiring the appellant to

go forward with the proof and meet the proposition established by the appellee's evidence.

Southern Ry. Co. v. Prescott, 240 U. S. 632
Jefferson Standard Life Ins. v. Clemnaer (C. C.
 A. 4) 79 Fed. (2) 724

In this the appellant wholly failed, and such obligation is not met by the pious statement that the function of the human body is so mysterious that even post mortem examinations frequently fail to reveal the cause of disease or even death (App. Brf., p. 54).

Modern medical science and the facilities of the United Marine Hospital at San Francisco were used by the appellant's witnesses in their treatment and examination of appellee in an endeavor to establish the cause of his loss of vision other than that testified to by appellee. As the court so aptly observed, there was no proof of any endogenous condition as the cause of the loss of sight. Under these circumstances, no other conclusion than that arrived at by the trial court was possible.

Apparently appellant does not challenge the amount of the judgment, as its only argument on this assignment of error refers to the preceding assignments of error and the arguments thereon, which have heretofore been discussed.

CONCLUSION

This case was tried to the court below on oral testimony and by deposition. There appeared before the court below the appellee and other witnesses, who testified concerning the fundamental issues before the court. The findings of the court on these issues, based on such personal observation, are entitled to a great deal of consideration in this court. Aside from the weight to be given to the lower court's decision, an examination of the record leads to no other conclusion but that the appellant was primarily negligent in permitting the stowage of the distress bombs in the forepeak of the vessel, and the consequential fire was due to the concurrent negligence of the seaman Uzdadinis. The evidence also supports the conclusion that the members of the crew in handling the hose at the time of the Kiska fire acted negligently when they permitted the full force of the hose to strike the appellee in the face.

The evidence is conclusive that these acts of negligence were the direct and proximate cause of the loss of vision of appellee's eye.

The findings of the lower court are amply supported by the evidence, and its judgment, therefore, should be affirmed.

Respectfully submitted,

SAM L. LEVINSON,
Proctor for Appellee.

No. 11100

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD J. STEEVES, HUGO CALGAN,
WILLIAM A. PORTER, and SAMUEL S.
TAYLOR,

Appellants,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

DEC 8 - 1945

PAUL P. O'BRIEN,
CLERK

No. 11100

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD J. STEEVES, HUGO CALGAN,
WILLIAM A. PORTER, and SAMUEL S.
TAYLOR,

Appellants,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Libel	16
Answer to Amended Libel	22
Appeal:	
Certificate of Clerk to Apostles on.....	78
Citation on	77
Cost Bond on	52
Designation of Respondent of Apostle on	72
Order Allowing	52
Order Transmitting Certain Original Ex-	
hibits on	71
Petition for	51
Praeceptum for Apostles on	76
Statement of Points and Designation of	
Record Upon Which Appellants Intend	
to Rely on	299
Stipulation re Contents of Exhibits and	
Portions of Testimony to be Included in	
Apostles on	73
Assignments of Error	54
Certificate of Clerk to Apostles on Appeal....	78

Index	Page
Citation on Appeal	77
Cost Bond on Appeal	52
Decision of the Court	32
Decree	50
Designation of Respondent of Apostles on Appeal (DC)	72
Designation of Record on Appeal, Statement of Points and (CCA)	299
Exceptions to Libel	9
Findings of Fact and Conclusions of Law....	35
Libel	2
Names and Addresses of Proctors	1
Order Allowing Appeal	52
Order on Exceptions to Libel	15
Order Transmitting Certain Original Exhibits	71
Petition for Appeal	51
Praeipie for Apostles on Appeal.....	76
Statement of Points and Designation of Record Upon Which Appellants Intend to Rely on Their Appeal	299
Stipulation re Contents of Exhibits and Portions of Testimony to be Included in Apostles on Appeal	73
Transcript of Testimony and Proceedings....	80

Index**Page****Exhibits for Respondent:**

- A—Demands Submitted by Masters,
Mates & Pilots and M.E.B.A., dated
Aug. 16, 1941 209
- A-3—Supplementary Agreement dated
Oct. 9, 1941, between Pacific Coast
Marine Firemen, Oilers, Water-
tenders and Wipers Assn., and Pa-
cific American Shipowners Assn... 114
- A-4—Supplementary Agreement, dated
Oct. 10, 1941, between Marine Cooks
& Stewards Assn. of the Pacific
Coast, and the Pacific American
Steamship Owners Assn. 119
- A-5—Supplementary Agreement, dated
Oct. 10, 1941, between National Or-
ganization of Masters, Mates &
Pilots of America and Pacific
American Ship Owners Assn..... 259
- A-6—Supplementary Agreement dated
Oct. 15, 1941, between Marine En-
gineers Beneficial Assn. and Pacific
American Ship Owners Assn..... 265
- A-7—Supplementary Agreement, dated
Oct. 16, 1941, between American
Communications Assn. and Pacific
American Ship Owners Assn..... 266

Index	Page
Exhibits for Respondent—(Continued)	
A-8—Supplementary Agreement, dated Oct. 9, 1941, between Sailors Union of the Pacific and Pacific American Ship Owners Assn.	266
A-9—Computation of Compensation..	269
A-10—Copy of Decision 2 of Maritime War Emergency Board	270
A-11—Decision 5 Revised of the Mari- time War Emergency Board.....	279
A-12—Original Decision 5 of Maritime War Emergency Board	287
B—Agreement dated Aug. 16, 1941...	213
C—Circular, dated Aug. 18, 1941, from American Merchant Marine Insti- tute, Inc., to Members Thereof....	223
D—Decision of National Defense Mediation Board in Case No. 80...	226
E—Supplementary Agreement dated Nov. 6, 1941, with National Mari- time Union	231
F—Supplementary Agreement No. 2, dated Dec. 2, 1941, with National Maritime Union	236
G—Proposals Submitted by American Merchant Marine Institute, and Pacific American Shipowners As- sociation, dated Aug. 12, 1941.....	242

Index**Page****Exhibits for Respondent—(Continued)**

H—War Bonus Proposals of Pacific
Coast Marine Firemen, Oilers,
Watertenders & Wipers Assn.,
dated Sept. 15, 1941 244

I—Demands of Sailors Union of the
Pacific, dated Sept. 16, 1941..... 250

J—Copy of Letter dated Oct. 24, 1941,
from M.E.B.A. to American Mer-
chant Marine Institute 255

K—Statement of Principles 199

Stipulation of Facts 81

Witnesses for Respondent:

Bryan, J. B. (Deposition)

—direct 187

Lintner, A. R.

—direct 83

—cross 100

—recalled, direct 156

Mullins, Wm. J. (Deposition)

—direct 160

—cross 184

Williams, W. L.

—direct 103

—cross 141

—redirect 153

NAMES AND ADDRESSES OF PROCTORS

Mr. SAM L. LEVINSON,

Proctor for Appellants,

1602 Northern Life Tower,
Seattle, Washington.

Mr. JOHN AMBLER of Messrs. Grosscup, Morrow & Ambler,

Proctors for Appellee,

910 Republic Building,
Seattle, Washington.

United States District Court, Western District of
Washington, Northern Division

In Admiralty

No. 14,625

EDWARD J. STEEVES, HUGO CALGAN,
WILLIAM A. PORTER and SAMUEL S.
TAYLOR,

Libelants,

vs.

AMERICAN MAIL LINE, a corporation,
Respondent.

LIBEL IN PERSONAM

Action Under Special Rule for Seamen to Sue
Without Security or Prepayment of Fees, for
the Enforcement of the Laws of the United
States, Common and Statutory, for the Pro-
tection of the Health and Safety of Seamen
at Sea.

Come now the libelants, and for a First Cause of
Action, allege:

I.

That at all times hereinafter mentioned, the re-
spondent American Mail Line was, and now is, a
corporation organized and existing under and by
virtue of the laws of the State of Nevada, author-
ized to do business and doing business and with its
principal place of business in the Western District
of Washington, Northern Division.

II.

That said respondent was the owner of the SS "Capillo", a merchant vessel of the United States, and employed the libelants as seamen on said vessel, on a voyage commencing at the Columbia River on the 11th day of October, 1941, to Asiatic waters, under written articles of employment, a copy of which is in possession of the respondent, and which provide, among other things, as follows:

"The American Mail Line agrees to pay an emergency war bonus to the crew of the SS Capillo, Voyage six (6), in accordance with the provisions contained in the applicable supplementary agreements in effect between the Pacific American Ship-owners' Association and the various Marine Unions.

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes.

"The company agrees to reimburse each man so affected by the amount of \$150.00 for each member of the crew, against the loss of personal effects as a result of war perils.

"It is further agreed that in the event of any increase in pay, overtime or war bonus or changes

in insurance which may be granted, as the result of negotiations between Union and the Pacific American Shipowners' Association, the Company will be governed by the terms and effective date of any agreement so reached."

III.

That said articles provided for the payment of a war bonus at the rate of \$80.00 per month for all time libelants, in the course of their employment, were west of the 180 meridian between the date that they signed on said vessel and the 7th day of December, 1941. That by Decision No. 2 of the Maritime War Emergency Board, dated January 11, 1942, which, by the terms of the rider hereinabove set forth were insofar as they relate to an increase in bonus incorporated in said articles of employment, the bonus rate was increased to 100% of the total monthly wages, in no event less than \$100.00 per month, such increase to take effect as of the 7th day of December, 1941.

IV.

That said vessel crossed the 180th meridian on the 2nd day of November, 1941, arriving at Manila, P. I., on the 1st day of December, 1941. That said vessel was continuously bombed by Japanese planes from the 8th day of December, 1941, to the 29th day of December, 1941, when said vessel was captured by the Japanese. That all libelants were imprisoned and interned by the Japanese as prisoners of war on the 3rd day of January, 1942, and were so interned in Shanghai until repatriated by arrival

in New York on the 2nd day of December, 1943, and by usual method of transportation would have arrived at a Pacific Coast port on December 7, 1943.

V.

That libelant Edward J. Steeves was employed as an oiler on said vessel at the rate of \$110 per month. That there became due and owing to the said libelant war bonus at the rate of \$80.00 per month from the 2nd day of November, 1941, to the 7th day of December, 1941, or the sum of \$93.37, and that there is due him a bonus at the rate of \$110.00 per month, being 100% of his wages, from the 7th day of December, 1941, to the 7th day of December, 1943, or the sum of \$2640.00, and the sum of \$125.00, being the reasonable cost of said libelant's transportation from New York to a Pacific Coast port, making a total amount due him of \$2858.37, no part of which has been paid, except the sum of \$154.66, and that there is now due and owing to the libelant Edward J. Steeves the sum of \$2703.71.

For a further and Second Cause of Action against the respondent, libelants allege:

I.

Libelants repeat, reallege, reaffirm and incorporate in this, their second cause of action, the allegations contained in paragraphs I to IV, inclusive, of their first cause of action as though fully set forth at length herein.

II.

That the libelant Hugo Calgan was employed as an oiler on said vessel at the rate of \$110.00 per month. That there became due and owing to the said libelant war bonus at the rate of \$80.00 per month from the 2nd day of November, 1941, to the 7th day of December, 1941, or the sum of \$93.37, and that there is due him a bonus at the rate of \$110.00 per month, being 100% of his wages, from the 7th day of December, 1941, to the 7th day of December, 1943, or the sum of \$2640.00, and the sum of \$125.00, being the reasonable cost of said libelant's transportation from New York to a Pacific Coast port, making a total amount due him of \$2858.37, no part of which has been paid, except the sum of \$154.66, and that there is now due and owing to the libelant Hugo Calgan the sum of \$2703.71.

For a further and Third Cause of Action against the respondent, libelants allege:

I.

Libelants repeat, reallege, reaffirm and incorporate in this, their third cause of action, the allegations contained in paragraphs I to IV, inclusive, of their first cause of action as though fully set forth at length herein.

II.

That the libelant William A. Porter was employed as a fireman on said vessel at the rate of \$100 per month. That there became due and owing to the

said libelant war bonus at the rate of \$80.00 per month from the 2nd day of November, 1941, to the 7th day of December, 1941, or the sum of \$93.37, and that there is due and owing him a bonus at the rate of \$100.00 per month, being 100% of his wages, from the 7th day of December, 1941, to the 7th day of December, 1943, or the sum of \$2400.00, and the sum of \$125.00, being the reasonable cost of said libelant's transportation from New York to a Pacific Coast Port, making a total amount due him of \$2525.00, no part of which has been paid, except the sum of \$154.66, and that is now due and owing to the libelant William A. Porter the sum of \$2370.34.

For a further and Fourth Cause of Action against the respondent, libelants allege:

I.

Libelants repeat, reallege, reaffirm and incorporate in this, their fourth cause of action, the allegations contained in paragraphs I to IV, inclusive, of their first cause of action as though fully set forth at length herein.

II.

That the libelant Samuel S. Taylor was employed as a messman on said vessel at the rate of \$87.50 per month. That there became due and owing to the said libelant war bonus at the rate of \$80.00 per month from the 2nd day of November, 1941, to the 7th day of December, 1941, or the sum of \$93.37, and that there is due and owing him a bonus at the

rate of \$100.00 per month, being the minimum bonus, from the 7th day of December, 1941, to the 7th day of December, 1943, or the sum of \$2400.00, and the sum of \$125.00, being the reasonable cost of said libelant's transportation from New York to a Pacific Coast port, making a total sum due him of \$2525.00, no part of which has been paid, except the sum of \$154.66, and that there is now due and owing to the libelant Samuel S. Taylor the sum of \$2370.34.

Wherefore, libelant pray for judgment against the respondent as follows:

1. That the libelant Edward J. Steeves recover judgment against the respondent in the sum of \$2703.71.

2. That the libelant Hugo Calkan recover judgment against the respondent in the sum of \$2703.71.

3. That the libelant William A. Porter recover judgment against the respondent in the sum of \$2370.34.

4. That the libelant Samuel S. Taylor recover judgment against the respondent in the sum of \$2370.34.

5. That libelants have and recover their costs and disbursements herein to be taxed.

SAM L. LEVINSON

RICHARD M. CANTOR

Proctors for Libelants

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL IN PERSONAM

Comes now American Mail Line, Ltd., a corporation, and excepts to the sufficiency, relevancy and competency of the Libel in Personam filed herein as follows:

I.

On the fact of the attached "Statement of Principles" under which the Maritime War Emergency Board was created and under which it functions it affirmatively appears that the war bonus of \$100.00 per month set forth in Paragraph III of the Libel is not, as alleged, an "increase in * * * war bonus * * * the result of negotiations" between the Unions and the Shipowners Association within the meaning of the last paragraph of the rider quoted in Paragraph II of the Libel. All reference to the Maritime War Emergency Board and Decision No. 2 of the Board must therefore be stricken.

II.

In the alternative:

If the Maritime War Emergency Board and its Rulings have been "incorporated" in the "articles of employment," as alleged in Paragraph III of the Libel, then this action must be dismissed for the reason that on the face of the attached Statement of Principles under which the Maritime War Emergency Board was created, and under which it functions, it affirmatively appears that such Board has exclusive and final jurisdiction of the issues here presented.

III.

In the alternative:

It affirmatively appears on the face of the attached Decision No. 2 of the Maritime War Emergency Board dated January 10, 1942, referred to in Paragraph III of the Libel as the authority upon which the claim of libelants is predicated, that such Decision established a "bonus rate for voyages." The entire Decision is wholly predicated upon the existence of a "voyage" and the fixing of a bonus for such a "voyage." By statute of the United States and by physical act of the enemy the "voyage" of the S. S. Capillo terminated at the time of the destruction of the vessel on December 29, 1941. (See 46 U.S.C. §593) The Decision has no application to the facts of this case and all reference to it must be stricken.

IV.

In the alternative:

The provisions of Decision No. 2 dated January 10, 1942, cannot be invoked in the Libel unless the provisions of Decision No. 5 Revised, dated February 21, 1942, of the Board, are likewise "incorporated." Decision No. 5 Revised expressly holds that a war bonus is not payable in the case of internment after the seaman is no longer exposed to "marine perils" as has been the case since December 29, 1941, when the vessel was destroyed. Under Decision No. 5 Revised the Libel must be dismissed.

These exceptions are based upon the files and

records of the above action and the Exceptive Allegations attached to and made a part hereof.

GROSSCUP, MORROW &

AMBLER

JOHN AMBLER

Proctors for Respondent.

EXCEPTIVE ALLEGATIONS

Comes now American Mail Line Ltd., a corporation, and in support of its Exceptions to the Libel in Personam filed herein, files these, its Exceptive Allegations in support of its Exceptions:

I.

Attached to and made a part hereof are the following documents directly or indirectly referred to in the Libel filed herein:

(1) Statement of Principles under which the Maritime War Emergency Board was created and under which it functions.

(2) Decision No. 2 of the Maritime War Emergency Board dated January 10, 1942.

(3) Decision No. 5 Revised of Maritime War Emergency Board dated February 21, 1942.

II.

On or about October 11, 1941, the Master of the American Steamship Capillo executed at Portland, Oregon, Shipping Articles with his crew for a round voyage to the Philippine Islands via Shang-

hai and Hong Kong, China. Before sailing from the United States the United States Navy took complete charge of routing the vessel and she did not call at China ports and proceeded to Manila, P. I., arriving there on or about November 29, 1941. The vessel was sunk under Japanese bombing on or about December 29, 1941, and her crew of approximately forty were thereafter interned by the Japanese. On or about December 2, 1943, the libelants in this action, members of the crew of the said vessel, were repatriated to New York on the International Exchange Vessel, M. S. Gripsholm. A representative of the owner met the four seamen in New York and promptly paid them off as indicated below.

III.

The Shipping Articles mentioned above and referred to in the Libel, in addition to the rider set out in Paragraph II of the Libel, have only the following specific provision with respect to the monetary compensation of the libelants:

Edward J. Steeves, oiler, "wages per month," \$100.00.

Hugo Calgan, oiler, "wages per month," \$100.00.

William Q. Porter, fireman, "wages per month," \$90.00.

Samuel S. Taylor, messman, "wages per month," \$77.50.

These wage rates set up in the Articles were made up from the provisions of Collective Bargaining Agreement dated as follows:

Oiler, base wages (Oct. 7, 1939) \$82.50, emergency increase (Feb. 10, 1941) \$17.50, total \$100.00.

Fireman, base wages (Oct. 7, 1939) \$72.50, emergency increase (Feb. 10, 1941) \$17.50, total \$90.00.

Messman, base wages (July 5, 1940) \$60.00, emergency increase (Feb. 10, 1941) \$17.50, total \$77.50.

The six maritime unions, for some time prior to October, 1941, had been negotiating concerning certain increases in wages, bonus, etc.

By contract dated October 10, 1941, between the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and Pacific American Shipowners Association, the basic wages of oilers and firemen were increased \$10.00 a month, making the total base wages and emergency increase for oilers \$110.00 and firemen \$100.00 a month.

By contract dated October 31, 1941, the base wages of messmen were likewise increased \$10.00 a month which made the total wages including emergency increase \$87.50 a month.

By contract dated October 9, 1941, the bonus rates payable to oilers and firemen on voyages west of the 180th Meridian only were increased from a flat \$60.00 a month, provided under the agreement of May 19, 1941, to \$80.00 per month.

In the case of messmen a similar increase was made from \$60.00 a month, provided in the agreement between the Marine Cooks and Stewards Association of the Pacific Coast and Pacific American Shipowners Association dated May 19, 1941, to \$80.00 a month under an agreement dated October 10, 1941.

The provisions of these contracts dated in October, 1941, were not known to the Master and crew members of the S. S. Capillo when the Shipping Articles dated October 11, 1941, were executed.

IV.

The four libelants were paid off in New York on or about December 3 and 4, 1943, as follows:

Edward J. Steeves and Hugo Calgan—Oilers

Wages and emergency increase—\$110.00 per month (From Oct. 11, 1941 to Dec. 2, 1943.)

William Q. Porter—Fireman

Wages and emergency increase—\$100.00 per month (From Oct. 11, 1941 to Dec. 2, 1943.)

Samuel S. Taylor—Messman

Wages and emergency increase—\$87.50 per month (From Oct. 11, 1941 to Dec. 2, 1943.)

The four crew members each received:

(1) Bonus at \$80.00 per month from crossing of the 180th Meridian on November 2, 1941 until the vessel was sunk on December 29, 1941.

(2) Philippine Island port bonus of \$125.00.

(3) A certain amount representing adjustment of advances, etc., against overtime as computed by the individual.

(4) Repatriation to the Port of New York on the M. S. Gripsholm at cost of respondent American Mail Line Ltd.

AMERICAN MAIL LINE LTD.,

Respondent

By GROSSCUP, MORROW &

AMBLER

JOHN AMBLER

Its Proctors.

[Title of District Court and Cause.]

ORDER ON EXCEPTIONS TO LIBEL
IN PERSONAM

The exceptions to libel in personam having duly come on for hearing before the above entitled court on the 5th day of October, 1944, and briefs having been filed on behalf of the respective parties, the subject having been fully argued by counsel for the respective parties, and the matter having been submitted, it is now, therefore,

Ordered, Adjudged and Decreed that the exceptions to libel in personam be and each of them is hereby sustained and allowed, with the right of libelants, if they so desire, to file an amended libel within ten (10) days from the date hereof.

To all of which the libelants except and their exception is allowed.

Done in open court this 6th day of October, 1944.

JOHN C. BOWEN

District Judge.

Approved as to form:

SAM L. LEVINSON

Proctor for Libelants

Presented by:

JOHN AMBLER

Proctor for Respondent

[Title of District Court and Cause.]

AMENDED LIBEL IN PERSONAM

Action Under Special Rule for Seamen to Sue Without Security or Prepayment of Fees, for the Enforcement of the Laws of the United States, Common and Statutory, for the Protection of the Health and Safety of Seamen at Sea.

Come now the libelants, and for an Amended First Cause of Action, allege:

I.

That at all times hereinafter mentioned, the respondent American Mail Line was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Nevada, authorized to do business and doing business and with its principal place of business in the Western District of Washington, Northern Division.

II.

That said respondent was the owner of the SS "Capillo" a merchant vessel of the United States, and employed the libelants as seamen on said vessel, on a voyage commencing at the Columbia River on the 11th day of October, 1941, to Asiatic waters, under written articles of employment, a copy of which is in possession of the respondent, and which provide, among other things, as follows:

"The American Mail Line agrees to pay an emergency war bonus to the crew of the SS Capillo,

Voyage Six (6), in accordance with the provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various Marine Unions.

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes.

"The company agrees to reimburse each man so affected by the amount of \$150.00 for each member of the crew, against the loss of personal effects as a result of war perils.

"It is further agreed that in the event of any increase in pay, overtime or war bonus or changes in insurance which may be granted, as the result of negotiations between Union and the Pacific American Shipowners' Association, the Company will be governed by the terms and effective date of any agreement so reached."

III.

That the applicable supplementary agreement in effect at the time said articles were signed provided for the payment of a war bonus at the rate of \$80.00 per month, commencing from the date that

said vessel crossed the 180th Meridian. That said vessel crossed the 180th Meridian on the 2nd day of November, 1941, arriving at Manila, P. I., on the 1st day of December, 1941. That said vessel was continuously bombed by Japanese planes from the 8th day of December, 1941, to the 29th day of December, 1941, when said vessel was captured by the Japanese. That all libelants were imprisoned and interned by the Japanese as prisoners of war on the 3rd day of January, 1942, and were so interned in Shanghai until repatriated by arrival in New York on the 2nd day of December, 1943, and by usual method of transportation would have arrived at a Pacific Coast port on December 7, 1943.

IV.

That libelant Edward J. Steeves was employed as an oiler on said vessel at the rate of \$110.00 per month. That there became due and owing said libelant war bonus at the rate of \$80.00 per month from the 2nd day of November, 1941 to the 7th day of December, 1943, or the sum of \$2013.33, and the sum of \$125.00 being the reasonable cost of said libelant's transportation from New York to the Pacific Coast, making a total amount due said libelant of \$2138.33, no part of which has been paid, except the sum of \$154.66, and that there is now due and owing to the libelant, Edward J. Steeves, the sum of \$2083.67, together with interest thereon at the legal rate from the 7th day of December, 1943, until paid.

For a further and Second Amended Cause of Action against the respondent, libelants allege:

I.

Libelants repeat, reallege, reaffirm and incorporate in this, their second cause of action, the allegations contained in paragraphs I to III, inclusive, of their first cause of action as though fully set forth at length herein.

II.

That the libelant Hugo Calgan was employed as an oiler on said vessel at the rate of \$110.00 per month. That there became due and owing said libelant war bonus at the rate of \$80.00 per month from the 2nd day of November, 1941, to the 7th day of December, 1943, or the sum of \$2013.33, and the sum of \$125.00 being the reasonable cost of said libelant's transportation from New York to the Pacific Coast, making a total amount due said libelant of \$2138.33, no part of which has been paid, except the sum of \$154.66, and that there is now due and owing to the libelant Hugo Calgan the sum of \$2083.67, together with interest thereon at the legal rate from the 7th day of December, 1943, until paid.

For a further and Third Amended Cause of Action against the respondent, libelants allege:

I.

Libelants repeat, reallege, reaffirm and incorporate in this, their third cause of action, the

allegations contained in paragraphs I to III, inclusive of their first cause of action as though fully set forth at length herein.

II.

That the libelant William A. Porter was employed as a fireman on said vessel at the rate of \$100.00 per month. That there became due and owing said libelant war bonus at the rate of \$80.00 per month from the 2nd day of November, 1941, to the 7th day of December, 1943, or the sum of \$2013.33, and the sum of \$125.00, being the reasonable cost of said libelant's transportation from New York to the Pacific Coast, making a total amount due said libelant of \$2138.33, no part of which has been paid, except the sum of \$154.66, and that there is now due and owing to the libelant William A. Porter the sum of \$2083.67, together with interest thereon at the legal rate from the 7th day of December, 1943, until paid.

For a further and Fourth Amended Cause of Action against the respondent, libelants allege:

I.

Libelants repeat, reallege, reaffirm and incorporate in this, their fourth cause of action, the allegations contained in paragraphs I to III inclusive, of their first cause of action as though fully set forth at length herein.

II.

That the libelant Samuel S. Taylor was employed as a messman on said vessel at the rate of \$87.50 per month. That there became due and owing said libelant war bonus at the rate of \$80.00 per month from the 2nd day of November, 1941, to the 7th day of December, 1943, or the sum of \$2013.33, and the sum of \$125.00 being the reasonable cost of said libelant's transportation from New York to the Pacific Coast, making a total amount due said libelant of \$2138.33, no part of which has been paid, except the sum of \$154.66, and that there is now due and owing to the libelant Samuel S. Taylor the sum of \$2083.67, together with interest thereon at the legal rate from the 7th day of December, 1943, until paid.

Wherefore, libelant prays for judgment against the respondent as follows:

1. That the libelant Edward J. Steeves have and recover judgment against the respondent in the sum of \$2083.67, together with interest thereon at the legal rate from the 7th day of December, 1943, until paid.

2. That the libelant Hugo Calgan recover judgment against the respondent in the sum of \$2083.67, together with interest thereon at the legal rate from the 7th day of December, 1943, until paid.

3. That the libelant William A. Porter have and recover judgment against the respondent in the sum of \$2083.67, together with interest thereon at

the legal rate from the 7th day of December, 1943, until paid.

4. That the libelant Samuel S. Taylor have and recover judgment against the respondent in the sum of \$2083.67, together with interest thereon at the legal rate from the 7th day of December, 1943, until paid.

5. That the libelants have and recover their costs and disbursements herein incurred.

SAM L. LEVINSON

RICHARD M. CANTOR

Proctors for Libelant

[Title of District Court and Cause.]

ANSWER TO AMENDED LIBEL
IN PERSONAM.

Comes now American Mail Line Ltd., a corporation, respondent in the above entitled action, and for answer to the amended libel in personam filed herein admits, denies and alleges as follows:

I.

Answering paragraph I of the amended libel in personam respondent admits it was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and that it is engaged in foreign commerce, having an office in the Western District of Washington, Northern Division.

II.

Answering paragraph II of the amended libel in personam respondent admits that the libelants on the 11th day of October, 1941, were employed as seamen on the S. S. Capillo, a merchant vessel owned by the United States of America, represented by the United States Maritime Commission, for a voyage from the Columbia River to Asiatic waters under written articles of employment, a copy of which is in the possession of the respondent and which provided, among other things, as shown in paragraph II of the amended libel in personam.

III.

Answering paragraph III of the amended libel in personam respondent admits that the vessel crossed the 180th Meridian on or about the 2nd day of November, 1941, and admits that the libelants were interned by the Japanese; that they arrived in the United States on or about December 1, 1943, and by usual method of transportation would have arrived at a Pacific Coast port on or about December 6, 1943.

IV.

Answering paragraph IV of the amended libel in personam respondent, American Mail Line Ltd., admits that libelant Edward J. Steeves was employed as an oiler on said vessel at the rate of \$110.00 per month.

And for answer to the second amended cause of action set forth in the amended libel in personam,

respondent American Mail Line Ltd. admits, denies and alleges as follows:

I.

Answering paragraph I thereof respondent repeats, realleges, reaffirms and incorporates in this, its answer to the second amended cause of action, the allegations contained in paragraphs I, II and III of its answer to the amended libel in personam as though fully set forth at length herein.

II.

Answering paragraph II of the second amended cause of action respondent American Mail Line Ltd. admits that libelant Hugo Calgan was employed as an oiled on said vessel at the rate of \$110.00 per month.

And for answer to the third amended cause of action set forth in the amended libel in personam respondent American Mail Line Ltd. admits, denies and alleges as follows:

I.

Answering paragraph I thereof respondent repeats, realleges, reaffirms and incorporates in this, its answer to the third amended cause of action, the allegations contained in paragraph I, II and III of its answer to the amended libel in personam as though fully set forth at length herein.

II.

Answering paragraph II of the third amended cause of action respondent American Mail Line

Ltd admits that libelant William Q. Porter was employed as a fireman on said vessel at the rate of \$110.00 per month.

And for answer to the fourth amended cause of action set forth in the amended libel in personam respondent American Mail Line Ltd. admits, denies and alleges as follows:

I.

Answering paragraph I thereof respondent repeats, realleges, reaffirms and incorporates in this, its answer to the fourth amended cause of action, the allegations contained in paragraphs I, II and III of its answer to the amended libel in personam as though fully set forth at length herein.

II.

Answering paragraph II of the fourth amended cause of action respondent American Mail Line Ltd. admits that libelant Samuel S. Taylor was employed as a messman on said vessel at the rate of \$87.50 per month.

Except as herein expressly admitted in the foregoing answers to the causes of action set forth in the amended libel in personam filed herein, respondent American Mail Line Ltd. denies each and all of the allegations set forth in said causes of action and the whole of each of said causes of action and the whole of the amended libel in personam.

And for a First Affirmative Defense to the amended first, second, third and fourth causes of action set forth in the amended libel in personam

respondent American Mail Line Ltd. alleges as follows:

I.

On or about October 11, 1941, the Master of the S.S. Capillo, a vessel owned by the United States of America, represented by the United States Maritime Commission, and operated by American Mail Line Ltd., under bareboat charter, signed articles with the crew of the said vessel for a "voyage from the Port of Portland, Oregon, to Shanghai and Hong Kong, China; thence to Philippine Island ports and such other ports and places in any part of the world as the master may direct and back to a final Pacific Coast port of discharge in the United States, to be designated by the master, for a term of time not exceeding six calendar months." The said articles contained a rider, copy of which is attached hereto, and by reference is incorporated herein and made a part hereof, marked Exhibit A.

II.

For some time prior to October 11, 1941, the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, of which libelants Edward J. Steeves, Hugo Calgan and William Q. Porter, were members, and Pacific American Ship-owners' Association, of which American Mail Line Ltd. was a member, were engaged in collective bargaining concerning the subject of wages, war bonus and other matters. For some time prior to October 11, 1941, the Marine Cooks and Stewards Association of the Pacific Coast, of which libelant, Samuel

S. Taylor, was a member, and Pacific American Shipowners' Association, of which respondent American Mail Line Ltd. was a member, were engaged in collective bargaining concerning the subject of wages, war bonus and other matters.

III.

Under date of October 9, 1941, a supplementary agreement between Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and Pacific American Shipowners' Association was entered into, the provisions of which were unknown to the parties executing the articles on the S. S. Capillo on October 11, 1941. By the terms of the supplementary agreement so reached the bonus payable on the current voyage was increased under its terms from \$60.00 to \$80.00 per month for the area covered by the voyage in question.

IV.

Under date of October 10, 1941, a supplementary agreement between Marine Cooks and Stewards Association of the Pacific Coast and Pacific American Shipowners' Association was entered into, the provisions of which were unknown to the parties executing the articles on the S. S. Capillo on October 11, 1941. By the terms of the supplementary agreement so reached the bonus payable on the current voyage was increased under its terms from \$60.00 to \$80.00 per month for the area covered by the voyage in question.

V.

Said contracts of October 9, 1941 and October 10, 1941, each contained the following paragraphs:

"1. The following war bonus rules shall govern the parties hereto—

(a) There shall be five war risk zones; namely:

I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

II. Trans-Atlantic voyages to Russia (Archangel etc.) (Whole voyage)

III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound until recrossing the same Meridian eastbound)

IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

V. Canada (Atlantic Coast) (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port)

(b) Members of the Union shall be paid a war

risk bonus at the rate of \$80 per month in the first four areas and \$33 in the fifth area provided, however, that all members of the Union entitled to receive basic monthly wages in excess of \$120, shall, in lieu of the bonuses specified above be paid at the rate of 66 2/3% of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area; a schedule of such bonuses is attached hereto and made a part of this agreement.

*

*

*

*

4. * * * In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.* * *

VI.

After the said articles were executed between the master and the crew of the S. S. Capillo on October 11, 1941, at Portland, Oregon, the vessel completed loading and proceeded to the mouth of the Columbia River where she was boarded by a representative of the United States Navy who thereafter took

complete charge of routing a course for said vessel. Under the specific instructions of the United States Navy the vessel proceeded by a roundabout course from the Columbia River to Manila, P. I. The vessel was forbidden by the United States Navy to call at her scheduled ports of discharge in China. The vessel arrived in Manila, P. I., on or about November 29, 1941, where a portion of her cargo was later requisitioned by the United States Government. The vessel was set afire and sunk by action of the Japanese on December 29, 1941, becoming at that time a total loss. The crew of said vessel, including the libelants, landed near Manila, P. I., and were subsequently interned by the Japanese. The libelants were later repatriated at the cost of the respondents on the International Exchange Motor Vessel Gripsholm arriving in New York on or about December 1, 1943. Upon arrival at New York libelants were paid basic wages and emergency wages specified in the applicable collective bargaining agreements between the parties to the date the libelants arrived at New York. Libelants were likewise paid war bonus at the rate specified in subdivision (b) of paragraph 1 of the said supplementary agreements while the libelants were in the war zone described in paragraph 1 (a) of the said agreements. All other provisions of the said supplementary agreement were likewise fully performed by respondent.

Wherefore, having fully answered, respondent prays that the amended libel in personam filed

herein be dismissed and that it be awarded its costs and disbursements herein expended and such other, further and different relief as to the court may seem just in the premises.

GROSSCUP, MORROW &

AMBLER

JOHN AMBLER

Proctors for Respondent,
American Mail Line Ltd.

EXHIBIT A

RIDER TO ARTICLES

The American Mail Line Agrees to Pay An Emergency War Bonus to the Crew of the S. S. Capillo, Voyage 6, in Accordance With Provisions Contained in the Applicable Supplementary Agreements in Effect Between the Pacific American Shipowners' Association and the Various Marine Unions.

In the Event the Vessel and/or Crew Be Interned, Imprisoned, Hospitalized or Put Ashore Due to War Causes and for That Reason, Be Unable to Continue Their Voyage, the Company Agrees to Pay Wages and Bonus to the Date Members of the Crew Arrive in An United States Port, on the Pacific Coast: Furthermore the Company Agrees. in Such Event, to Arrange for Repatriation of Such Men to An United States Port, on the Pacific Coast. Also, That the Company Be Liable for Any Injuries Suffered by Any Crew Member Due to War Causes.

The Company Agrees to Reimburse Each Man So Affected by the Amount of \$150.00 in the Event of Loss of Personal Effects by Any Member of the Crew Due to Necessity of Abandoning the Ship Resulting From Torpedoing, Mining, Bombing, Shelling, Scuttling or Any Other War Causes, Which Results in the Ship Wreck of the Vessel.

The Company Also Agrees to Carry War Risk Insurance in the Amount of \$2,000.00 for Each Member of the Crew, Against Loss of Life As a Result of War Perils.

It Is Further Agreed That in the Event of Any Increase in Pay, Overtime or War Bonus, Which May Be Granted, As the Result of Negotiations Between the Union and the Pacific American Ship-owners' Association, the Company Will Be Governed by the Terms and Effective Date of Any Agreement So Reached.

GALE T. BLUNDELL

Deputy U. S. Shipping Commissioner

K. O. DREYER

Master

[Title of District Court and Cause.]

DECISION OF THE COURT

April 6, 1945

The Court: This is one of the most involved cases I ever saw. That is a condition resulting

directly from the war situation and from the desire of citizens, particularly those connected with the maritime industry, to cooperate with the war effort, even to the exclusion of their clear understanding of employer-employee relations.

It is the opinion of the Court, however, that this case may be solved within the principles of contract law.

The shipping articles provided, among other things, that the respondent agrees to pay an emergency war bonus to the crew, including libelants, in accordance with provisions contained in the applicable supplementary agreements, and so forth.

Two of those applicable supplementary agreements are in evidence. Of these, the first is one dated October 9, 1941, (Respondent's Exhibit A-3), between Respondent's representative and the Pacific Coast Marine Firemen, Oilers, Water Tenders and Wipers Association (representing three of the libelants here); and the second is the supplementary agreement of October 10, 1941, (Respondent's Exhibit A-4), between Respondent's representative and the Marine Cooks & Stewards Association of the Pacific Coast (representing the fourth libelant). By these two supplementary agreements, it seems to the Court that the rights of the parties sought to be adjudicated in this action have been stipulated, and from these agreements I think the intention of the parties may be ascertained, if to them may be added the explanatory matter contained in the other evidence received before the Court.

In addition to what I have just said, I entertain no doubt but that it is established by the evi-

dence that the Statement of Principles (Respondent's Exhibit K) was expressly consented to by the libelants' unions, and that the libelants' unions, representing libelants, among other employees in the maritime industry, expressly consented and approved the creation by the President of the Maritime War Emergency Board; and that by subscribing to that Statement of Principles, libelants' unions consented to be bound by the decisions of the Maritime War Emergency Board.

That Board, according to the statement of Respondent's counsel, has decided that maritime employees repatriated on the Gripsholm are entitled to a war bonus while such employees are on such a repatriating voyage; and counsel for the respondent has also stated that in this case these libelants have not been paid that repatriating voyage bonus.

The Court finds, concludes and decides, that these libelants are entitled to a bonus, as stipulated in Respondent's Exhibits A-3 and A-4, for the time that the libelants were on the Gripsholm repatriating voyage to a continental port of the United States.

The Court further finds, concludes and decides that the libelants are not entitled to recover anything for the expense of travel and maintenance, or either, from the Atlantic Coast to the Pacific Coast after their repatriation to a United States continental port.

The Court further finds, concludes and decides that the libelants are not entitled to be paid the war bonus at the rate provided in Respondent's

Exhibits A-3 and A-4 while the libelants were interned by the Japanese authorities, and that they are not entitled to any other sums sued for herein, other than as above stated.

Is there any other point or issue not covered?

Mr. Levinson: I think that is all, your Honor.

Mr. Ambler: That covers it.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having duly come on for trial upon the merits before the above entitled court on April 4th and 5th, 1945, and having been duly submitted upon certain admissions of the respondent, depositions and oral testimony of witnesses of respondent, and the argument of counsel having been heard and the court having decided the case; now, therefore, the court makes these its

FINDINGS OF FACT

I.

The Master of the S. S. Capillo, an American vessel operated by American Mail Line Ltd., signed shipping articles with his crew at Portland, Oregon, October 11, 1941. The articles contemplated a voyage to the Philippine Islands via Shanghai and Hong Kong, China, and return to the Pacific Coast of the United States. The course of the vessel was taken over by the U. S. Navy at the time of leaving the Columbia River, and under the directions of

the U. S. Navy the vessel proceeded to Honolulu, T. H., and from there via a circuitous route to Manila, P. I., arriving in Manila Harbor November 29, 1941. The vessel was thereafter sunk by enemy action on December 29, 1941.

II.

The articles of the vessel as to the four libelants show the following "particulars of engagement:"

	"In what capacity	Wages per Month
"Edward J. Steeves	Oiler	\$100.00
Hugo Calgan	Oiler	100.00
William Q. Porter	Fireman	90.00
Samuel S. Taylor	Messman	77.50."

Attached to the articles and signed by the Master and the Deputy United States Shipping Commissioner is the following "Rider to Articles":

"The American Mail Line Agrees to Pay an Emergency War Bonus to the Crew of the S. S. Capillo, Voyage 6, in Accordance with Provisions contained in the Applicable Supplementary Agreements in Effect Between the Pacific American Shipowners' Association and the Various Marine Unions.

"In the Event the Vessel and/or Crew Be Interned, Imprisoned, Hospitalized or Put Ashore Due to War Causes and for That Reason, Be Unable to Continue Their Voyage, the Company Agrees to Pay Wages and Bonus to the Date Members of the Crew Arrive in an United States Port, on the Pacific Coast: Furthermore, the Company Agrees, in Such Event, to Arrange for Repatria-

tion of Such Men to an United States Port, on the Pacific Coast. Also, That the Company Be Liable for Any Injuries Suffered by Any Crew Member Due to War Causes.

“The Company Agrees to Reimburse Each Man so Affected by the Amount of \$150.00 in the Event of Loss of Personal Effects by Any Member of the Crew Due to Necessity of Abandoning the Ship Resulting From Torpedoing, Mining, Bombing, Shelling, Scuttling or Any Other War Causes, Which Results in the Ship Wreck of the Vessel.

“The Company Also Agrees to Carry War Risk Insurance in the Amount of \$2,000.00 for Each Member of the Crew, Against Loss of Life as a Result of War Perils.

“It Is Further Agreed That in the Event of Any Increase in Pay, Overtime or War Bonus, Which May Be Granted, as the Result of Negotiations Between the Union and the Pacific American Shipowners' Association, the Company Will Be Governed by the Terms and Effective Date of Any Agreement so Reached.”

III.

Pacific American Shipowners' Association is a trade association formed in 1936 to act on behalf of offshore and coastwise ship operators of the Pacific Coast in negotiating and executing collective bargaining agreements on behalf of its members with the six maritime unions operating on the Pacific Coast representing seagoing personnel in the various departments of a vessel. Since 1937 the Asso-

ciation has successfully negotiated contracts with the following unions relating to wages and working conditions of offshore personnel:

National Organization of Masters, Mates and Pilots of America

Marine Engineers Beneficial Association

American Communications Association, Marine Division

Sailors Union of the Pacific

Pacific Coast Marine Firemen, Oilers, Water-tenders and Wipers Association

Marine Cooks & Stewards Association of the Pacific Coast

The last two unions have and do represent the libelants.

IV.

General agreements covering the subject of wages and working conditions were negotiated by the Association with the six maritime unions under various dates in late 1939 and 1940. The wages specified in these general agreements were uniformly referred to in the shipping industry as "basic wages."

Commencing in the fall of 1939 collective bargaining agreements made by the Association on behalf of its members with the unions merely contained a provision for special settlement of bonuses on voyages in war zones. The Association did not at this time negotiate for its members on the subject of war bonuses. The individual companies negotiated and settled with the unions the details

and amount of war bonuses. This, however, led to inequities and confusion so in 1940 the Association undertook to establish general standards through general agreements with each union on a uniform basis applicable to all ships entering defined war zones.

It was customary when changes or additions were to be made to "general" agreements to include same in so-called "supplementary" agreements. Following the entry of the Association into the establishment of general uniform standards in the industry on the subject of war bonus "supplementary" agreements were made with the six maritime unions in 1940 covering a wage increase and a war bonus. The increase was known as an "emergency" increase or sometimes "emergency" wage. In general these first supplementary agreements provided for a ten per cent "emergency" increase in wages and a "bonus" of twenty-five per cent of basic and emergency wages on trans-Pacific voyages from the time of the arrival of the vessel at her first Japanese port westbound to departure from the last Japanese port eastbound. Unlicensed personnel earning under \$100.00 per month received a flat \$10.00 a month emergency increase. A second supplementary agreement was made on February 10, 1941, with the unions enlarging the "emergency" increase to fifteen per cent of the wages and enlarging the twenty-five per cent war bonus on trans-Pacific voyages to the period when the vessel crossed the 160th Meridian westbound until the vessel recrossed the 160th Meridian eastbound. The unlicensed personnel

earning under \$120.00 a month received a flat emergency increase of \$17.50 a month and a flat \$30.00 a month bonus. On May 19, 1941, a third supplementary agreement was made covering merely bonus. By this supplementary agreement the bonus was increased to fifty per cent of basic wages for the same war area. The flat bonus to unlicensed personnel earning under \$120.00 per month was increased to \$60.00 per month. For the first time war risk insurance was provided for crew members in the amount of \$2,000 each.

V.

The rivalry existing between individual operators and unions on the Pacific Coast which had been solved to some extent by the foregoing Pacific Coast industry-wide agreements on the subject of war compensation now extended to a rivalry between unions on the Pacific and Atlantic Coasts and new subjects for discussion, such as loss of personal effects, increased war risk insurance, repatriation and compensation in case of loss or destruction of the vessel or internment of the crew, were raised. Serious work stoppages ensued and at length a meeting was called of the vessel operators on both Coasts and the Maritime unions on both Coasts to work out a national uniform program. In calling this meeting the invitations sent out by Admiral E. S. Land, Chairman of the U. S. Maritime Commission, addressed to the President of American Merchant Marine Institute, Inc., read in part as follows:

representatives of seagoing organized labor and

“A series of conferences are being called on August 12, August 15, and August 19, 1941, between representatives of seagoing organized labor and offshore steamship operators for the purpose of affording these representatives an opportunity of reaching a decision covering the payment of war bonuses on a national uniform basis.

“These conferences will be held under the auspices of the Department of Labor and the Maritime Commission, and will take place in Room 7856 of the Department of Commerce Building, at 10:00 A. M., on the dates mentioned above. The first conference, on August 12, will be devoted to the question of war bonuses as they affect licensed and registered officers; on August 15, as they effect radio operators; and on August 19, as they effect unlicensed personnel.

* * * * *

“A communication identical to this is being sent to Mr. A. O. Woll, Secretary of the Pacific American Tank Ship Association, and to Mr. J. B. Bryan, President of the Pacific American Shipowners Association. If you think it is desirable that invitations be sent to others than those mentioned herein, will you kindly advise me to that effect.”

VI.

American Merchant Marine Institute, Inc., is a trade association representing the principal offshore, coastwise and intercoastal operators on the Atlantic Coast. For many years it has negotiated contracts for its members with various unions rep-

representing seagoing personnel. Contracts negotiated by the American Merchant Marine Institute, Inc., for the most part, set the pattern for such negotiations on the Atlantic Coast as did such contracts negotiated by the Pacific American Shipowners' Association on the Pacific Coast.

VII.

At the opening of this conference on "War Bonuses" on August 12, 1941, Commissioner Edward Macauley of the U. S. Maritime Commission made the following opening remarks:

"As you know from the letters inviting you to be present, this conference between representatives of the licensed officers' organizations and representatives of the off-shore steamship operators is being held under the auspices of the Department of Labor and the U. S. Maritime Commission, in order to permit these representatives an opportunity to present to the Department of Labor and the Maritime Commission their views as to the determination of a proper national uniform basis for payment of war bonuses to the licensed officers of American merchant ships.

"It is desired that this reference be confined strictly to the purpose for which it has been called, i.e., to achieve a nationwide agreement on war risk, compensation. It is considered that other subjects, such as wages, hours and working conditions, are extraneous and not pertinent to the discussion."

VIII.

As a result of this conference a contract was concluded on August 16, 1941, between the American Merchant Marine Institute, Inc., and Pacific American Shipowners' Association, representing the employers on both Coasts, and the two unions representing the licensed officers on both Coasts. This contract, in brief, created five war risk areas, raised the bonus to 60 per cent on "trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies and Malayan Peninsula". The bonus commenced "from the crossing of the 180th Meridian westbound, until recrossing the same Meridian eastbound." A formula for future adjustment of bonus was incorporated, \$500.00 was allowed for loss of personal effects; \$5000. war risk insurance was provided, and in the event the vessel was interned, destroyed or abandoned wages and emergency wages were payable until returned to a Continental United States port. The contract was to remain in effect "until its abolition, as may be anticipated upon the cessation of hostilities between warring nations, as proclaimed by the President of the United States or otherwise."

IX.

Subsequent negotiations with other offshore unions fell through on both Coasts. The seriousness of the situation is illustrated by the following telegram dated September 22, 1941, from Chairman Land of the U. S. Maritime Commission to the President of American Merchant Marine Institute, Inc.:

“Maritime Commission views with concern and anxiety the danger to shipping so vitally needed for national defense and all out aid to the democracies unless some method and procedure are immediately found and resorted to which will remove future sources of contention between all elements of the industry and which will stabilize and to a greater extent than now prevails standarize bonuses on our various trade routes. Believing that the solution of these problems rests primarily in the hands of representatives of operators and representatives of personnel and that these objectives can be secured through a joint meeting, the Maritime Commission will if requested by these representatives call such a meeting. We therefore offer the facilities of the Maritime Commission for purposes of holding conferences between the Seafarers’ International Union, National Maritime Union, Sailors’ Union of Pacific, Marine Cooks & Stewards of Pacific and Marine Firemen, Oilers, Water Tenders and Wipers Association of Pacific representing unlicensed personnel of vessels operated by companies who have collective bargaining agreements with those unions and the American Merchant Marine Institute, also the Pacific American Shipowners’ Association representing the owners, also other owners not members of those associations so that agreement can be reached between the owners and the unlicensed personnel with respect to war bonuses and war risk areas. Will be glad to make our facilities available for meeting in Washington Thursday this week. The Maritime Commission

urges immediate return to work and sailing of vessels. Will appreciate your telegraphic reply. E. S. Land, U. S. Maritime Commission."

At length hearings commenced on September 29, 1941, before a Panel of the National Defense Mediation Board in Case No. 80, involving the American Merchant Marine Institute, Inc., and the Pacific American Shipowners' Association and the Sailors' Union of the Pacific, and Waterman Steamship Co. Prior to this hearing formal demands had been served upon the Pacific American Shipowners' Association by the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association under date of September 15, 1941, and the Sailors' Union of the Pacific under date of September 16, 1941, making extensive demands for bonus and other war compensation. A decision rendered by the Panel of the National Defense Mediation Board on or about October 6, 1941, was promptly accepted by all parties on both the Atlantic and the Pacific Coasts and supplementary agreements were entered into by the American Merchant Marine Institute, Inc., on the Atlantic Coast with unlicensed personnel stabilizing industry in regard to the war bonus and other compensation on that Coast. Similar contracts were entered into in October, 1941, between Pacific American Shipowners' Association and the six maritime unions accomplishing the same result on the Pacific Coast on the following dates:

National Association of Masters, Mates and Pilots of America, West Coast Local No. 90, October 10, 1941.

Marine Engineers' Beneficial Association, October 15, 1941.

American Communications Association (Marine Division), October 16, 1941.

Sailors' Union of the Pacific, October 9, 1941.

Pacific Coast Marine Firemen, Oilers, Water-tenders and Wipers' Association, October 9, 1941.

Marine Cooks and Stewards Association of the Pacific Coast, October 10, 1941.

The agreements covering libelants provided in part as follows:

"The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles."

X.

The details, character and results of the negotiations on the subject of war bonus and war compensation conducted since August 1941, to October 1941, were unknown to the American Mail Line Ltd. and to the crew and unions representing the crew of the S. S. Capillo at the time the articles were signed on October 11, 1941. Since August 13, 1941, American Mail Line Ltd. had used the rider quoted in paragraph II above as a standard form of rider on vessels leaving the Columbia River. The rider had been prepared and presented to it by the unions representing the crew. The rider was designed to incorporate by reference the provisions

of applicable supplementary agreements negotiated between the Pacific American Shipowners' Association on the one hand and the six maritime unions on the other. On account of the number of unions involved and the time necessarily involved in negotiations and the rapidly changing development in the international affairs, it was impracticable for the vessel and the parties involved to execute articles intelligently without incorporating much that was thereafter to be finally arranged between the negotiators.

XI.

Shortly after the attack on Pearl Harbor, on December 17-19, 1941, American Mail Line Ltd., through Pacific American Shipowners' Association, became a party to the "Statement of Principles" drawn up in Washington at a joint meeting of all maritime employers and unions. These six maritime unions of the Pacific Coast, including the unions representing the libelants in this action, likewise became a party to this "Statement of Principles". By the terms of the Statement the parties delegated to a board to be appointed by the President full powers to fix and settle all questions of bonus and other war compensation.

Thereafter the Board, from time to time, issued decisions on the subject prescribing a national uniform pattern for the vessels of the American Merchant Marine raising, by Decision No. 2, dated January 10, 1942, the rate of bonus for libelants as of December 7, 1941, from \$80.00, fixed in the October

supplementary agreements, to \$100.00 per month. Thereafter the Board, by Decision No. 5, Revised, dated February 21, 1942, likewise prescribed compensation to be allowed families of interned seamen and compensation to be paid to seamen shipwrecked or interned by war causes. Such compensation included wages and emergency wages until repatriated to a Continental United States port, bonus during the repatriation voyage, loss of effects \$150.00 and port bonus \$125.00. By the terms of the rider to the articles the decisions and rulings of the National War Emergency Board became applicable to the parties here involved and they are bound thereby.

XII.

Respondent has paid libelants bonus at the rate of \$80.00 per month from December 7, 1941 to December 29, 1941. This should be increased to \$100.00 a month for this period, allowing libelants each \$14.67 additional bonus before the vessel was destroyed and the crew went ashore. Libelants were repatriated to the Port of New York on the M/S Gripsholm, a vessel operating under international protection. It is stated by respondent that the repatriation voyage consumed 82 days and that war bonus has been allowed by the National War Emergency Board to other repatriates on the same vessel under similar circumstances at the rate of \$100.00 per month. Libelants do not deny this, although they do not admit respondent's liability is limited to such repatriation voyage. Libelants are entitled to war bonus at such \$100.00 rate for the repatria-

tion voyage totaling \$273.33 each. Respondent's obligation to repatriate libelants ceased with their landing at the Port of New York and no wages or transportation are due to the libelants from that port to the Pacific Coast.

Done in open court this 13th day of April, 1945.

JOHN C. BOWEN,

District Judge.

From the above Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

Libelants should each recover from respondent the sum of \$288.00 representing increased war bonus from December 7, 1941 to December 29, 1941, and during the repatriation voyage.

II.

Libelants' claim for war bonus during the period of libelants' internment ashore should be denied.

III.

Libelants' claim for wages and transportation from the Port of New York to the Pacific Coast should be denied.

IV.

No costs should be allowed to either party.

Done in open court this 13th day of April, 1945.

JOHN C. BOWEN,

District Court Judge.

Libelants except to all of the foregoing and their exceptions are allowed.

JOHN C. BOWEN,
District Judge.

In the District Court of the United States for the
Western District of Washington,
Northern Division

In Admiralty

No. 14,625

EDWARD J. STEEVES, HUGO CALGAN,
WILLIAM A. PORTER and SAMUEL S.
TAYLOR,

Libelants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Respondent.

DECREE

The above case having duly come on for hearing upon the merits before the above entitled court on April 4th and 5th, 1945, and the matter having been duly heard and the court having heard argument of counsel and the case having been submitted, and the court having entered its Findings of Fact and Conclusions of Law, now, therefore, it is

Ordered, Adjudged and Decreed that the libelants and each of them are hereby awarded judg-

ment against the respondent in the sum of \$288.00, or a total sum of \$1152.00; it is further

Ordered, Adjudged and Decreed that libelants' other claims against respondent be and the same are hereby denied, and it is further

Ordered, Adjudged and Decreed that no costs are allowed to either party.

To all of which the libelants duly except, and their exception is allowed.

Done in open court this 13th day of April, 1945.

JOHN C. BOWEN

District Judge.

[Title of District Court and Cause.]

LIBELANTS' PETITION FOR APPEAL

Libelants, being aggrieved by the decree, rulings, and findings of the United States District Court therein, claim an appeal from said decree, rulings, and findings, and pray that their said appeal may be allowed.

EDWARD J. STEEVES,

HUGO CALGAN,

WILLIAM A. PORTER,

SAMUEL S. TAYLOR,

Libelants.

By SAM L. LEVINSON,

Their Proctor.

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

Done in open court this 15th day of June, 1945.

JOHN C. BOWEN,

Judge.

Presented by:

SAM L. LEVINSON,

Proctor for Libelants.

[Endorsed]: Filed June 15, 1945.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That the Continental Casualty Company, a surety company organized and existing under and by virtue of the laws of the State of Indiana, and authorized to do business and doing business in every state of the United States and the District of Columbia, is held and firmly bound to the American Mail Line, Ltd., a corporation, in the sum of Two Hundred and Fifty and no/100 Dollars (\$250.00), to be paid to the said American Mail Line, Ltd., a corporation, for the payment of which, well and truly to be made, it binds itself firmly by these presents.

Signed and Sealed at Seattle, Washington, this 15th day of June, 1945.

[Seal]

CONTINENTAL CASUALTY
COMPANY

By GRANT B. MEYERS,
Attorney-in-Fact.

The terms and conditions of this bond are such that

Whereas, Edward J. Steeves, Hugo Calgan, William A. Porter and Samuel S. Taylor, as appellants, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a decree of the United States District Court, Western District of Washington, Northern Division, bearing date the 13th day of April, 1945, in a suit wherein Edward J. Steeves, Hugo Calgan, William A. Porter and Samuel S. Taylor are appellants and the American Mail Line, Ltd., a corporation, is respondent.

Now, Therefore, the condition of this obligation is such that if the above named appellants, Edward J. Steeves, Hugo Calgan, William A. Porter and Samuel S. Taylor shall prosecute said appeal with effect, and shall pay all costs which may be awarded against them if such appeal is not sustained, then this obligation shall be null and void; otherwise to remain in full force and effect.

[Seal]

CONTINENTAL CASUALTY
COMPANY

By GRANT B. MEYERS,
Attorney-in-Fact.

Approved:

GROSSCUP, MORROW &
AMBLER

By BEN C. GROSSCUP,
Proctor for Respondent.

Approved:

JOHN C. BOWEN,

United States District Judge.

[Endorsed]: Filed June 15, 1945.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The appellants, Edward J. Steeves, Hugo Calgan, William A. Porter and Samuel S. Taylor, hereby assign as error in the proceedings, decree, orders and decision of the District Court in the above entitled action, as follows:

(1) The District Court erred in entering Finding of Fact III upon the grounds that such finding is immaterial and irrelevant to the issue, and there was no competent evidence to support said finding.

(2) The District Court erred in entering Finding of Fact IV on the grounds that said finding is immaterial and irrelevant, and there is no competent evidence to support said finding.

(3) The District Court erred in entering Finding of Fact V upon the grounds that such finding is immaterial and irrelevant to the issue, and that there is no competent evidence to support said finding.

(4) The District Court erred in entering Finding of Fact VI, on the grounds that said finding is immaterial and irrelevant.

(5) The District Court erred in entering Finding of Fact VII, on the grounds that said finding is immaterial and irrelevant.

(6) The District Court erred in entering Finding of Fact VIII, on the grounds that said finding is immaterial and irrelevant.

(7) The District Court erred in entering Finding of Fact IX, except that portion of said Finding of Fact which states that supplementary agreements were entered into between the Pacific American Shipowners' Association and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and the Marine Cooks and Stewards Association, dated October 9, 1941, and October 10, 1941, respectively, on the grounds that said finding is immaterial and irrelevant, and not supported by competent evidence.

(8) The District Court erred in entering Finding of Fact X, upon the grounds that the same is immaterial and irrelevant, and that said finding is not supported by competent evidence.

(9) The District Court erred in entering Finding of Fact XI, upon the grounds that the same was immaterial and irrelevant, and that said finding is not supported by competent evidence.

(10) The District Court erred in entering Finding of Fact XII, except that portion of said finding which states that the respondent has paid libelants bonus at the rate of \$80.00 per month from December 7, 1941, to December 29, 1941, upon the grounds that said finding is immaterial and irrelevant and not supported by competent evidence, and contains an erroneous determination of the amount due the libelants.

(11) The District Court erred in entering Conclusions of Law I, II and III.

(12) The District Court erred in entering the Decree awarding each of the libelants the sum of \$288.00.

(13) The District Court erred in failing to enter a decree in favor of the libelant Steeves in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, in failing to enter a decree in favor of the libelant Calgan in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, in failing to enter a decree in favor of the libelant Porter in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, and in failing to enter a decree in favor of the libelant Taylor in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, and costs in favor of the libelants.

(14) The District Court erred in admitting in evidence respondent's Exhibit "K" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit was a document entitled "Statement of Principles", and was adopted at a conference of representatives of steamship companies and maritime unions held in Washington, D. C., December 19, 1941. This exhibit, in substance, provided that it was desirable and necessary that a uniform basis of war bonus and insurance covering the entire maritime industry be reached; that maritime labor give its assurance to the United States Government that they will not strike during the period of war;

and steamship companies agree there will be no lock-out; that the utilization of collective bargaining will not be impaired by reason of any act of the conference; that all agreements and obligations arising out of collective bargaining will not be violated; to provide machinery for the settlement of disputes without interruption of service or stoppage of work during the period of war, and to insure application of the maximum war effort; providing for the creation of a proposed maritime war emergency board with the powers set forth in Exhibit "A" attached to said exhibit. Exhibit "A" attached provides that the unions and the vessel operators, having pledged themselves to co-operate in the war effort, it is of importance that means shall be established to insure that questions that may arise which are likely to interrupt the war effort, shall be settled promptly.

Under present conditions, in order to afford a procedure for settling questions relating to war risk compensation and insurance it is proposed there shall be established a board to be known as the Maritime War Emergency Board, which shall consist of three members named by the President. Disputed questions of war risk compensation shall be referred to the Board, and upon notice and hearing, its decision shall be final. Advisory committees of steamship operators and unions are set up. Pursuant to this agreement, on December 19, 1941, President Roosevelt appointed John R. Steelman, Edward Macauley and Frank P. Graham to constitute the Maritime War Emergency Board.

(15) The District Court erred in admitting in evidence respondent's Exhibit "A-5" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-5" was a document dated October 10, 1941, being a supplementary agreement between the Master, Mates and Pilots Association, West Coast Local 90 (representing licensed deck officers), and the Pacific Shipowners Association. This agreement designated the war areas and provided for payment to members of the Masters, Mates and Pilots Union of war bonus, at designated rates, and for the payment of bonus during such time as the members of the union were in the war zone. None of libelants were members of this union.

(16) The District Court erred in admitting in evidence respondent's Exhibit "A-6" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-6" was a document dated October 15, 1941, being a supplementary agreement between the Marine Engineers Beneficial Association (the union representing the licensed engineer officers), and the Pacific Shipowners Association. This agreement designated the war areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of the libelants were members of this Association.

(17) The District Court erred in admitting in evidence respondent's Exhibit "A-7" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-17" was a document dated October 16, 1941, being a supplementary agreement between the American Communications Association representing the radio operators and the Pacific Shipowners Association. This agreement designated the war areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of libelants were members of this association.

(18) The District Court erred in admitting in evidence respondent's Exhibit "A-8" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-8" was a document dated October 9, 1941, being a supplementary agreement between the Sailors' Union of the Pacific and the Pacific Shipowners' Association. This agreement designated the war areas and provided for the payment of war bonus, at designated rates, and for the payment of bonus during such time as the members of the S. U. P. were in the war zone. None of the libelants were members of the S. U. P.

(19) The District Court erred in admitting respondent's Exhibit "A-10" over libelants' objection that it was immaterial and irrelevant. Libel-

ants' objection was overruled, and exception allowed.

Respondent's Exhibit "A-10" was a copy of Decision No. 2 of the Maritime War Emergency Board, dated January 10, 1942, containing classification of bonus areas and the rate of bonus. Six classifications were established with appropriate bonus rates, and also providing for the payment of certain port bonuses. Nothing in this exhibit relates to the payment of bonus during internment.

(20) The District Court erred in admitting respondent's Exhibit "A-11" over libelants' objection that it was immaterial and irrelevant, which objection was overruled, and exception allowed.

This exhibit is Decision No. 5 Revised of the Maritime War Emergency Board, dated February 1, 1942, requesting that all persons in possession of the previous Decision No. 5, and the supplements hereinafter referred to as Respondent's Exhibit "A-12", destroy the same, and this revised Decision No. 5 sets forth the new procedure whereby the owner or operator of the vessel shall pay the dependents of seamen during internment the amounts which have been allotted to said dependents. This Revised Decision No. 5 provides that it is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the payments provided for or contained in the ship's articles entered into on or before February 21, 1942, with respect to payment of bonus during internment, or where the making of such payments was expressly left open subject to a later agreement either in the

ship's articles or collective bargaining. This decision substantially follows Exhibit "A-12" in that it sets for the procedure of payment of wages to either the members of the crew or their dependents during the period of internment, and provides similarly that war bonus shall continue from the time of the loss of the vessel until the seaman arrives at the port where he is no longer exposed to marine perils, and is subject to the retro-active provisions hereinabove set forth.

(21) The District Court erred in admitting respondent's Exhibit "A-12", to which libelants objected on the ground that the same was immaterial and irrelevant, which objection was overruled, and exception allowed.

Exhibit "A-12" was denominated Maritime War Emergency Board Decision No. 5, and supplements. This exhibit sets forth the procedure whereby an owner or operator of a vessel, sunk by enemy action, shall pay to the seaman, or his dependents, wages and allotments during internment of the seaman. It defines certain classes of dependents which shall receive such allotment in the event no allotment has been made by the seaman. Supplement dated February 6, 1942, provides that the Decision shall be retro-active to December 7, 1941, and further provides that the seaman shall have the right to agree with the ship owner that such seaman shall be paid wages during the period of internment, through the medium of the American Red Cross, or other governmental agency. Amendment to Decision No. 5, also part of this exhibit, dated Febru-

ary 17, 1942, re-states that Decision No. 5 clearly covers vessels in the American Merchant Marine which are sunk or damaged by enemy action, or the destruction of such vessel by any of the United Nations. This amendment sets forth that the Board has given consideration to the continuance of bonus in case of destruction of the vessel, which subject was not covered by Decision No. 5, and adds a number of articles to Decision No. 5, designating the same as Article No. 6, and providing that where such vessel is lost as the result of enemy action, the war bonus shall continue at the rate which prevailed immediately before loss until the seaman arrives at a port where he is no longer exposed to marine perils. This further provides, however, that the provision of the supplement to Decision No. 5 providing that the terms of the decision shall be retroactive to December 7, 1941, shall be applicable only where there was no agreement with respect to the making of payments provided for or contained in the ship's articles entered into on or before January 10, 1942.

(22) The District Court erred in admitting in evidence respondent's Exhibit "B", Mullins' Deposition over objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Exhibit "A", Mullins Deposition, was a written proposal by the Masters, Mates and Pilots Association and the Marine Engineers' Beneficial Association; submitted to a conference called by the United States Maritime Commission and the Department

of Labor in July and August, 1941, between the American Merchant Marine Institute, representing the Atlantic coast vessels, and the Pacific-American Shipowners' Association, representing the Pacific coast vessels, and the two unions above referred to. This proposal set forth their demands for bonus in various war areas and the proposed war risk insurance policies covering their members.

(23) The District Court erred in admitting in evidence respondent's Exhibit "B", Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit was the agreement entered into on August 16, 1941, between the Marine Engineers' Beneficial Association and the Masters, Mates and Pilots Association and the American Merchant Marine Institute and the Pacific American Shipowners' Association covering the proposed bonuses and wages for the war risk areas defined therein. This exhibit also included a copy of a letter from Admiral Land to Mr. Frank J. Taylor, President of the American Merchant Marine Institute, dated July 22, 1941, calling a conference. The exhibit further included the opening remarks by Admiral Macauley to the members of the conference at the time of their meeting on August 12, 1941, and a request by them to further the war effort.

(24) The District Court erred in admitting Exhibit "C", Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. This objection was overruled, and exception allowed.

This exhibit was a form letter from the Secretary of the American Merchant Marine Institute, dated August 18, 1941, addressed to its members, advising them of the result of the meetings with the Masters, Mates and Pilots and Marine Engineers, and the negotiations and agreements entered into between them.

(25) The District Court erred in admitting Exhibit "D", Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a copy of the decision of the National Defense Mediation Board Decision No. 80 of hearings held on September 29th and October 1st, 2nd, 3rd and 4th, 1941, in which the American Merchant Marine Institute, Pacific American Shipowners Association, Waterman Steamship Corporation, parties on the one side, and the Seafarers' International Union of N. A. and the Sailors' Union of the Pacific were opposing parties. This resulted in certain recommendations by the Board, which, in substance, were as follows: That the crews of American vessels perform an essential role in the national war effort, and that a number of named shipping companies are associated in the American Merchant Marine Institute and the West Coast companies are associated in the Pacific American Shipowners' Association, and the Waterman Steamship Company is not affiliated with either group; that the unlicensed personnel are represented by the S. I. U. and the S. U. P.; that collec-

ve bargaining relationships have been established
y most owners and one or another of the unions,
nd for the negotiation of general contract the
arties have worked out among themselves appro-
riate methods. However, a special problem arises
om the risk run by men who go to sea in time of
ar, and it was with this problem that the recom-
endations are concerned. To cover the bonus
hich would be fair under present conditions and
rovide machinery for equitable future bonus, if
onditions change, the National Defense Mediation
oard recommends, until changed, bonus rules
ased on five war risk areas as defined therein, with
urther provision that able-bodied seamen shall be
aid a bonus of \$80.00 per month in the first four
reas and \$33.00 a month in the fifth area. The
urth area covers the trans-Pacific route. Provi-
on is also made for port attack bonuses. The
oard further recommends the following machinery
r making equitable future adjustment: Any sig-
atory may ask for a change, such request to be
ade in writing to the other party for whom change
sought, and if an agreement is not reached within
e week, the matter be referred to the United
ates Department of Labor, Division of Concilia-
on; if not then determined, it may be referred to
Board composed of three members appointed by
e President, and such Board shall have power to
ake recommendations. It further provides that
e recommendations relating to the bonus areas
all be effective to November 1, 1942, and that an
endment to November 1, 1943, and during this

period there shall be no strike. It is further set forth that nothing in these recommendations shall be interpreted to reduce benefits now existing under collective bargaining contracts, and all the recommendations shall become effective on ships that sail after August 16, 1941, or any earlier effective date set by special rider. If any dispute arise as to the interpretation or recommendations and the parties cannot adjust that dispute by collective bargaining, either party may avail themselves of the arbitration conciliation provisions provided in the recommendations.

(26) The District Court erred in admitting Exhibit "E", Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a blank form of supplementary agreement between the National Maritime Union and the name of the company left in blank, bearing date November 6, 1941, which set forth the bonus areas and the rates of bonus.

(27) The District Court erred in admitting Exhibit "F", Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a supplementary agreement in blank between the National Maritime Union and unnamed companies, bearing date December 12, 1941, concerning bonus areas and bonus rates.

(28) The District Court erred in admitting

Respondent's Bryan Deposition-Exhibits "A", "B" and "D" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Bryan Deposition-Exhibits "A", "B" and "D" are the same documents heretofore referred to as Mullins' Deposition-Exhibits "A", "B" and "D", respectively.

(29) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "G" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

This exhibit was the written counter-proposal, dated August 12, 1941, made by the Pacific American Shipowners' Association and American Merchant Marine Institute to the demands of the two unions representing the licensed personnel, which negotiations and conference resulted in a contract heretofore referred to as Respondent's Exhibit "B". These proposals defined the various war risk areas and the bonuses to be paid, and provided for a \$5000.00 war risk insurance for loss of life. This proposal suggested the payment of wages during the period of internment until the officer arrives at a Continental United States port.

(30) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "H" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Bryan Deposition-Exhibit "H" was the war

bonus proposal of the Pacific Coast Marine Firemen, Watertenders and Oilers' Association, dated September 15, 1941, setting forth proposed war bonus areas and the rates to be paid in those areas, requesting war risk insurance, and requesting payment of wages and bonuses in the event of internment until the men arrived at a continental United States port. Requests were also made for insurance on personal effects and for certain meal benefits while awaiting transportation.

(31) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "I" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a copy of a letter from the Sailors' Union of the Pacific, dated September 10, 1941, directed to the Pacific American Shipowners' Association, setting forth their reasons for a proposed amendment to the current war bonus provisions and submitting certain bonus demands covering particular areas, including a request for the payment of bonus until the member of the union is returned to a home port, and also requesting certain war risk insurance on personnel and property of personnel, as well as increased wages by reason of carrying war cargo.

(32) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "J" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a letter from the Marine Engineers' Beneficial Association, dated October 24, 1941, directed to the American Merchant Marine Institute, calling attention to certain differences in the bonus provisions in the agreements entered into on the Atlantic Coast between the Marine Engineers' Beneficial Association and the American Merchant Marine Institute and the Pacific American Shipowners' Association on the Pacific Coast.

(33) The District Court erred in admitting the testimony of the witness Mullins by deposition over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, to which libelants excepted, and exception allowed.

The witness Mullins testified that he was secretary of the American Merchant Marine Institute, which is composed of vessel operators of the Atlantic Coast, and that as such he participated in and identified the documents hereinabove referred to in connection with the negotiations conducted between the American Merchant Marine Institute and the National Maritime Union, such negotiations taking place prior to the execution of the shipping articles and rider under which the libelants were employed. The witness also identified and testified concerning the letters written by the American Merchant Marine Institute to its members advising them of the result of the negotiations. He identified National War Labor Mediation Board Decision No. 80, and testified concerning the hearings.

(34) The District Court erred in admitting in evidence the testimony of the witness J. B. Bryan

by deposition over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

The witness Bryan testified that the Pacific American Shipowners' Association, formed in 1936, acted in labor relations matters between its members and seafaring unions; that commencing in 1939, collective bargaining agreements contained special settlement of war bonus; that because of confusion arising between separate agreements entered into by the various companies following a series of conferences held in Washington, D. C., a uniform agreement with the unions representing the licensed personnel was entered into. Bryan participated in these negotiations, which were preceded by written demands made by these two unions, which he identified and which were admitted as above set forth. He also identified the same documents testified to by William Mullins in his deposition. He identified the written demands made by the Radio Operators Association, and demands made by the Sailors' Union of the Pacific dated September 16, 1941. He testified concerning the hearing in Case No. 80 before the National Defense Mediation Board covering the general subject matter of war risk and war bonus, which hearing was held in October, 1941, and which resulted in certain written recommendations by the Board. He identified the dates upon which supplementary agreements were entered into between the Pacific Shipowners' Association and the six unions representing sea-going personnel, and testified concerning com-

munications between the Pacific Shipowners' Association and the American Merchant Marine Institute about the possible differences in the language of the contracts, and identified a letter dated October 24, 1941, referred to in Bryan Deposition-Exhibit "J" concerning such differences.

EDWARD J. STEEVES,
HUGO CALGAN,
WILLIAM A. PORTER,
SAMUEL S. TAYLOR,

Appellants,

By SAM L. LEVINSON,
Their Proctor.

[Endorsed]: Filed June 15, 1945.

[Title of District Court and Cause.]

ORDER DIRECTING THE TRANSMISSION
OF ORIGINAL EXHIBITS

This Matter having come on for hearing upon motion of the libelants,

It is hereby Ordered that Respondent's Exhibits "A-1", "A-2" and "A-13" be transmitted in their original form to the Circuit Court of Appeals for the Ninth Circuit.

Done in Open Court this 18th day of June, 1945.

JOHN C. BOWEN,

Judge.

Presented by:

SAM L. LESINSON,

Proctor for Libelants.

Approved:

GROSSCUP, MORROW &
AMBLER

Proctor for Respondent.

[Title of District Court and Cause.]

DESIGNATION OF RESPONDENT OF
PARTS OF APOSTLES ON APPEAL AND
PRAECIPE

To Sam L. Levinson, Northern Life Tower, Seattle,
Proctor for Libelants, and

To Millard P. Thomas, Clerk of the United States
States District Court for the Western District
of Washington, Northern Division:

Respondent hereby designates and requests that
the record on appeal in the above entitled case shall
include:

(1) Libel in personam.

(2) Exceptions to libel in personam with at-
tached exceptive allegations, omitting the verifica-
tion thereof, and omitting the three documents at-
tached to the exceptive allegations which are al-

ready a part of the apostles as Exhibits in the cause numbered "K", "A-10" and "A-11", respectively.

(3) Order on exceptions to libel in personam.

GROSSCUP, MORROW &
AMBLER

JOHN AMBLER

Proctors for Respondent.

[Title of District Court and Cause.]

STIPULATION RE CONTENTS OF THE EX-
HIBITS AND PORTIONS OF THE TESTI-
MONY TO BE INCLUDED IN THE APOS-
TLES ON APPEAL

It Is Hereby Stipulated by and between the parties hereto, through their respective undersigned proctors of record, that the following portions of the exhibits and testimony may be omitted from the Apostles on Appeal:

1. Omit from respondent's Exhibit A-3, the title page, all of paragraph 2 on page 3, all of page 4, all of page 5, and all of page 6, excepting, however, the two signatures indicated and the date, and omit all schedules attached.

2. Omit from Respondent's Exhibit A-4, the title page and all schedules attached to said exhibit.

3. Omit from Respondent's Exhibit A-5, the title page and all signatures, except the signatures of J. B. Bryan and C. F. May, and omit all schedules attached to said exhibit.

4. Omit from Respondent's Exhibit A-6 the title page and all portions of said exhibit, excepting the date and designation of parties, being the first paragraph of page 1 of said exhibit, and the signatures of Pacific-American Shipowners, J. B. Bryan, Marine Engineers' Beneficial Association, R. Merriwether, on page 6 of said exhibit.

5. Omit from Respondent's Exhibit A-7 the title page and all portions of said exhibit, excepting the date and designation of the parties and the first "whereas" paragraph on page 1, and the signatures of Pacific-American Shipowners, J. B. Bryan, and American Communications Association, Marine Division, George F. B. King and P. A. T. Hendricks on page 6.

6. Omit from Respondent's Exhibit A-8, the title page, all of page 2 except paragraph 1(b) on said page, and omit all of pages 3, 4, 5 and 6, excepting the date and signatures of the Pacific-American Shipowners, J. B. Bryan, and Sailors' Union of the Pacific, Harry Lundeborg, appearing on page 6. The omitted portions being a duplication of the corresponding portions of the contracts covering unlicensed and licensed personnel respectively.

7. Omit from the Transcript of Proceedings, beginning with the word "could" on line 27, page 11, through line 15 on page 14.

8. Omit from the Transcript of Proceedings lines 10 to 30, inclusive, page 16.

9. Omit from the Transcript of Proceedings lines 1 to 6, inclusive, page 17.

10. Omit from the Transcript of Proceedings lines 21, page 21, through line 16, page 22.

11. Omit from the Transcript of Proceedings lines 10 to 20, inclusive, page 23.

12. Omit from the Transcript of Proceedings lines 1 to 24, inclusive, page 32.

13. Omit from the Transcript of Proceedings all of page 43.

14. Omit from the Transcript of Proceedings lines 1 to 12, inclusive, page 44.

15. Omit all of the testimony beginning on line 5, page 49, through line 16, page 61, of the Transcript of Proceedings, inserting in lieu thereof the summary set out in the transcript.

16. Omit from the Transcript of Proceedings all testimony beginning on line 2, page 62, through line 14, page 65, and inserting in lieu thereof the summary set out in the transcript.

17. Omit from the Transcript of Proceedings all of pages 66, 67 and through line 19 on page 68, and inserting in lieu thereof the summary as set out in the transcript.

18. Omit from the Transcript of Proceedings line 9, page 92, through line 25, page 115, and inserting in lieu thereof the summary set out in the transcript.

Dated at Seattle, Washington, this 3rd day of June, 1945.

SAM L. LEVINSON

Proctor for Libelants.

GROSSCUP, MORROW &

AMBLER

Proctors for Respondent

It is further stipulated that all formal portions of pleadings, including headings, verifications, certificates, and file marks, may be omitted by the Clerk.

GROSSCUP, MORROW &
AMBLER

Proctors for Respondent.
SAM L. LEVINSON

[Title of District Court and Cause:]

PRAECIPE FOR APOSTLES ON APPEAL

To: Millard P. Thomas, Clerk of the United States
District Court for the Western District of
Washington, Northern Division.

Libelants hereby request that the Record on Appeal in the above entitled case shall include:

- (1) Amended libel in personam.
- (2) Answer to amended libel in personam.
- (3) Court's oral opinion rendered at the close of the hearing.
- (4) Findings of Fact and Conclusions of Law.
- (5) Decree.
- (6) Petition for appeal.
- (7) Appeal bond.
- (8) Assignment of error.
- (9) Citation on appeal.
- (10) Stipulation of proctors (pp. 2, 3 and 4, Transcript of Proceedings.)
- (11) Testimony of A. R. Lintner, and W. L. Williams.

(12) Depositions of William G. Mullins and J. B. Bryan.

(13) The following respondent's exhibits: "K", "A-1", "A-2", "A-3", "A-4", "A-5", "A-6", "A-7", "A-8", "A-9", "A-10", "A-11", and "A-12", "A-13", Mullins Deposition Exhibits "A", "B", "C", "D", "E" and "F". Bryan Deposition Exhibits "G", "H", "I", and "J".

SAM L. LEVINSON

Proctor for Appellants.

[Title of District Court and Cause.]

CITATION ON APPEAL

To: American Mail Line, Ltd., a corporation; and

To: Messrs. Grosscup, Morrow & Ambler, its
proctors:

Whereas, Edward J. Steeves, Hugo Calgan, William A. Porter and Samuel S. Taylor have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the entry of the decree denying recovery as prayed for in libelants' amended libel, which decree was entered in the District Court of the United States for the Western District of Washington, Northern Division, on the 13th day of April, 1945;

You are, therefore, hereby cited to appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, at the next term of court on the 25th day of July, 1945, to do and re-

ceive what may appertain to justice to be done in the premises.

Given under my hand in the City of Seattle, State of Washington, in the Ninth Circuit, on the 15th day of June, 1945.

JOHN C. BOWEN

Judge.

[Endorsed]: Filed June 15, 1945.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 207, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Praecipes and Stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcript of Testimony, the original of which is sent up as part of this record, constitute the apostles on appeal from the Decree of said United States District

Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, dated April 13, 1945.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act February 11, 1925) for making record, certificate or return

514 folios at 05c.....\$25.70

Appeal fee (Section 5 of Act)..... 5.00

Certificate of Clerk to Apostles on

Appeal50

Certificate of Clerk to Original Exhibits .50

Total.....\$31.70

I further certify that the above amount has been paid to me by the proctor for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 13th day of July, 1945.

[Seal]

MILLARD P. THOMAS,

Clerk.

By TRUMAN EGGER

Chief Deputy.

In the District Court of the United States for the
Western District of Washington
Northern Division

In Admiralty No. 14625.

EDWARD J. STEEVES, HUGO CALGAN,
WILLIAM A. PORTER, AND SAMUEL S.
TAYLOR,

Libelants,

vs.

AMERICAN MAIL LINE, a corporation,
Respondent.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Be It Remembered, that heretofore and on to-wit April 5, 1945, at the hour of 9:30 a. m., the above entitled matter came regularly on for trial before the Hon. John C. Bowen, United States District Judge;

Libelants appearing by Sam L. Levinson, Esq.,
their proctor;

Respondent appearing by John Ambler, Esq., its
proctor.

Whereupon, the following proceedings were had:

(Proctors for Libelants and Respondent
made their opening statements to the Court.)

The Court: Now, then, the Libelants, of course, have the right to present the Libelants' proof. Do you want to introduce a stipulation which will dispense with your proof?

Mr. Levinson: May I, Counsel, indicate a stipulation, and I believe that will dispense with the proof as to the facts.

Mr. Ambler: It is stipulated that the Libelants were members of the crew of the *Capillo* in their respective positions: Two were oilers, one was a fireman, and one was a mess man.

It is stipulated that they signed articles on the vessel on or about October 11, 1941; that the vessel proceeded to Manila; that the vessel was destroyed by enemy action on or about December 29, 1941; that thereafter the Libelants were interned by the Japanese; that they were repatriated to the United States on the Motor Ship *Gripsholm*, arriving in New York on or about December 1, 1943.

It is further stipulated that if the Libelants are entitled to recover, each is entitled to bonus at the rate of \$80 per month. It is also agreed that the Libelants have been paid their wages and emergency increase during the entire period until their arrival in New York; that they have been paid overtime; that they have been paid an attack bonus as provided in the supplemental agreements.

It is also agreed that they were paid war bonus from the time the vessel crossed the 180th Meridian westbound, in accordance with the supplemental agreements in effect there, until the date when the vessel was sunk in Manila Harbor, December 29, 1941.

It is further agreed that the expenses of repatriation have been paid by the ship owner, but the

crew have not been paid any transportation from New York, the first Continental port in the United States, to the Pacific Coast; and it is also agreed that if they are entitled to that, the rate for that transportation would be \$125 apiece.

There will be a photostatic copy of the actual articles introduced in the case, and there is no dispute as to the fact that they were entered into by the respective parties.

Mr. Levinson: With such stipulation, your Honor, the Libelants rest.

The Court: What effect, if any, does this stipulation have upon the answer, the admissions and denials in the answer?

Mr. Levinson: None at all.

Mr. Ambler: They were admitted in the answer.

The Court: Pardon?

Mr. Ambler: The facts that I have stated were admitted in the answer.

The Court: Do you still insist upon all of the denials in the answer, notwithstanding any matters stated in the stipulation?

Mr. Ambler: No, your Honor. If there are any——

The Court: (Interrupting) Wait just a moment. Do you still insist upon all the denials in the answer, notwithstanding anything that is stated in the stipulation? Specifically, notwithstanding the stipulation, does the Respondent deny the right of the Libelants to recover any of these sums mentioned in the stipulation?

Mr. Ambler: That is correct. In other words, notwithstanding the statements that were made, the admissions, there is still a denial that the Libelants are entitled to recover in this case, for the reasons to be shown by Respondent's testimony.

The Court: Is there anything else on the part of the Libelants that is needed to be said before the Libelants rest?

Mr. Levinson: I know of nothing, your Honor.

The Court: And do the Libelants now rest?

Mr. Levinson: Libelants now rest.

(Libelants rest.)

The Court: The Respondent may now proceed.

Mr. Ambler: Mr. Lintner.

A. R. LINTNER,

called as a witness in behalf of the Respondent, being first duly sworn, testified as follows:

Direct Examination

Br. Mr. Ambler:

Q. Your name is A. R. Lintner, (spelling) L-i-n-t-n-e-r? A. That is right.

Q. And what is your present residence?

A. My home residence?

Q. Yes. A. 3441 Cascadia Avenue.

Q. Seattle? A. Seattle 44.

Q. And what is your present occupation?

A. I am presently vice-president and general manager of the American Mail Line.

(Testimony of A. R. Lintner.)

Q. How long have you been in that position?

A. Since April 1, 1940.

Q. That was immediately after the reorganization of this company? A. That is correct.

Q. What has been your experience in the shipping industry? How long have you been in it?

A. Well, I have been in it since——

Mr. Levinson: (Interrupting) Mr. Lintner is a well-experienced shipping man of many years.

Q. (By Mr. Ambler): Go ahead.

A. I have been actively connected with the steamship industry since about 1916, in various capacities, which involved seven years of foreign service in the steamship business, involved being the manager for the States Steamship Company and Pacific-Atlantic, which is a Portland, Oregon——

Q. (Interrupting) Your headquarters were in Portland then?

A. Yes, and that was a period from 1937 to 1940.

Q. Were you formerly District Director here for the old Shipping Board?

A. Yes, I was District Director in about 1924 to '28, I believe, somewhere in there.

Q. In your foreign service, where were you stationed? What part of the world?

A. I was located in the Orient, with headquarters at Kobe, Japan, but covered the entire Orient.

Q. Have you had any position with the War Shipping Administration?

(Testimony of A. R. Lintner.)

A. Yes, I was drafted, you might say, to be Pacific Coast Director for the War Shipping Administration in 1942, February, I believe, and acted in that capacity up until June, '43, when I was designated as Director for the North Pacific Area for the War Shipping Administration, with headquarters here in Seattle. I am still acting in that capacity.

Q. First, you were in entire charge of the operation of the War Shipping Administration for the Pacific Coast? A. That is correct.

Q. And then, at your request, you were relieved of that and came back to Seattle, is that correct?

A. Yes, that is right.

Q. And during your service with the War Shipping Administration you were loaned to them by the American Mail Line, serving without salary, is that correct? A. That is right, yes.

Q. Are you familiar with the Pacific American Ship Owners Association? A. Yes.

Q. What is the nature of that Association?

A. Well, it represents, I think, all of the steamship companies who have their main offices on the Pacific Coast, in their labor relations, labor negotiations with the Maritime Unions.

Q. How many Maritime Unions are there?

A. There are six.

Q. On the Pacific Coast?

A. On the Pacific Coast.

Q. Is American Mail Line, Ltd., a member of the Pacific American Ship Owners Association?

(Testimony of A. R. Lintner.)

A. Yes.

Q. Has it been a member for some years?

A. Yes, it has been a member for years.

Q. Does American Mail Line, Ltd., do any labor negotiating as an individual company?

A. No.

Q. All negotiations are conducted through the Association, is that it? A. That is correct.

Q. Are you familiar with the American Merchant Marine Institute?

A. Yes, I know that it is a parrallel institution representing the main operators or a majority of the operators on the Atlantic Coast in their labor relations.

Q. Does it perform similar functions on behalf of its members? A. Yes.

Q. Is American Mail Line a member of the American Merchant Marine Institute?

A. No.

Q. Would you explain briefly the mechanics of how the association negotiates these agreements; that is, the meetings and what ultimately comes of it.

A. Well, I don't know how to put it in words, but as labor situations develop—well, let me put it this way: The Pacific American Ship Owners Association is the bargaining agent and represents the steamship owners in their contacts and in the agreements reached with the labor unions. The mechanics of that is to have an organization which we call the Pacific American Ship Owners Asso-

(Testimony of A. R. Lintner.)

ciation, with a salaried head and a Board of Directors, and, as labor agreements are made or opened up, the Association undertakes to contact the Unions and sit in conference with them and arrive at some sort of an agreement.

Q. And as a result of that agreement in the past, have written contracts been made?

A. Yes.

Q. And those contracts are signed by whom?

A. They are signed by the various unions and the Pacific American Ship Owners Association as representing its members.

Q. Are you a director of the Pacific American Ship Owners Association? A. No.

Q. You have been in the past? A. Yes.

Q. Do you recall the situation which existed in the Pacific Coast in the early part of 1941 concerning the subject of war bonus?

A. Yes, I recall it rather distinctly. The world situation, we were all in difficulties; the world was at war, other than comparatively few nations, including ourselves. The sea-going personnel were uneasy about the risks involved, and naturally there was a great deal of confusion and there was considerable delay in sailing vessels while some basis of understanding was arrived at, or while we were trying to arrive at some understanding; and for the most part, the development was rather gradual, even as far back as 1938, or maybe it was '39, when there was some element of risk in even going

(Testimony of A. R. Lintner.)

to China and Japan, when Japan and China were at war. There were actual cases of where the Unions insisted upon certain compensation for the risk involved. At that time there was just an occasional steamship company involved, and therefore the Association as such didn't take an active part in those negotiations, but the individual company would tell the Association what it was doing.

Q. You are now speaking just of bonus?

A. Yes. I am speaking of bonus all the time, and I would say that was in 1937. Then, as Europe and a larger part of the world came into the war, the situation became more confused. Nobody knew exactly what they were doing. We all were trying to arrive at some sort of a basis, but the events were moving so rapidly on the Atlantic Coast and the Pacific Coast, and as between the different companies, that nobody was in a position to arrive at a definite figure or a settled amount, and the situation reached a point in 1941 where the United States Government, through the Maritime Commission and the Department of Labor, had to take a hand to stabilize it.

The Court: Now, I don't know what your purpose is in putting in the record facts concerning 1937. I will not deprive you of the opportunity if you consider it material.

Mr. Ambler: My next question, I think, will bring that out.

Q. (By Mr. Ambler) After those individual negotiations by individual companies on the subject

(Testimony of A. R. Lintner.)

of bonus, were there any industry-wide negotiations conducted on that? That is, did the Pacific American Ship Owners Association start taking a hand in bonus questions? A. Yes.

Q. Do you recall approximately when that was?

A. I would say that was in the spring of '41.

Q. And contracts were made at that time with Unions on an industry-wide basis, is that right?

A. That is right.

Mr. Levinson: I dont' think you should lead him quite so much, Counsel. I object to that.

The Court: Avoid leading.

Q. (By Mr. Ambler): Will you state whether or not, in the spring of 1941 or before, the subject of bonus had been handled on an industry-wide basis, rather than on an individual company basis?

A. Yes, I am sure it was, because there was a specific overall agreement on various features of it in May 1941.

Q. You spoke of a meeting called in 1941 by the Maritime Commission and the Department of Labor on this subject. Do you recall where that was? Was that held on the Pacific Coast or on the Atlantic Coast?

A. I believe it was held in Washington, Washington or New York, in July 1941.

Q. And as a result of those meetings, were any contracts entered into by the parties?

A. If I recall correctly, two of the Marine-going organizations entered into contracts, and the balance of them did not.

(Testimony of A. R. Lintner.)

Q. Who were representing the employers at that time in those negotiations, do you recall?

A. The American Merchant Marine Institute was representing the Atlantic Coast operators, and the Pacific American Ship Owners Association was representing the Pacific operators.

Q. (By Mr. Ambler): Mr. Lintner, immediately following the attack on Pearl Harbor, will you state whether or not the negotiations between the associations and the unions were superseded by any other method of handling?

Mr. Levinson: I object to that on the ground that it is not material. The contract involved here was entered into in October, 1941. The date referred to is December, 1941. I will object until there is some showing of some authorization on the part of the parties to this contract to be bound by subsequent agreements. I haven't objected and I am willing to let things go in by the way of preliminary statements, but now we are on the direct issue.

Mr. Ambler: I wish to show at this time, your Honor, that in December 1941, that the negotiations between the Association and the various Unions on the subject of bonus,—not wages, but bonus—was suspended, and a Board was formed in Washington in December, 1941, which has already been the subject of discussion and is a matter of public knowledge. The proceedings of it are reported in the American Maritime Cases, and all the opera-

(Testimony of A. R. Lintner.)

tors in the United States, including the War Shipping Administration, are operating under its rules, so there is no secret and it is a matter of public record.

The Court: I believe that it is possible that the objection might go to the method of approach. I think one way of proper approach would be to ask him what, if anything, happened at or about a certain time concerning a certain subject.

Mr. Levinson: I will admit the existence of the Board. I am not denying that, Your Honor.

The Court: Well, I don't know enough of what Counsels attitude is. It might be that, under proper questioning, he might wish the record to show some facts concerning it. If so, he may have that privilege.

Mr. Ambler: May I have this marked Exhibit K.

(Whereupon, Statement of Principles was marked Respondent's Exhibit K for identification.)

Q. (By Mr. Ambler): Mr. Lintner, handing you for identification a document which has been marked Respondent's Exhibit K, will you state what that is?

Mr. Levinson: I have no objection to the form of the exhibit, Counsel, the fact that it is not certified and that it is merely a typewritten copy. I am not objecting to that. Counsel has informed me that this is a true copy, and my objection will not,

(Testimony of A. R. Lintner.)

therefore, go to the form. My objection goes to the materiality of the exhibit as such, although it is probably improper at this time until the witness states what it is.

A. This is a statement of principles as agreed upon between representatives of the Steamship Companies and representatives of the Maritime Unions, as a result of a meeting held in Washington, D. C., on December 17 to 19, 1941, under the joint auspices of the Maritime Commission and the Department of Labor.

Q. What was done as a result of that meeting?

The Court: I would suppose the witness doesn't know what subject matter you refer to.

Q. (By Mr. Ambler): Will you state whether or not, as a result of that meeting, a Board was set up?

A. Yes. That was the answer I was going to make. Out of this meeting and out of this joint agreement or joint statement of principles, a war-time—let's see.

Q. The Maritime War Emergency Board?

A. Maritime War Emergency Board was set up.

Q. Attached to that statement of principles is a copy of the letter of President Roosevelt appointing this Board. Will you state what have been the duties of that Board since it was created in December, 1941?

Mr. Levinson: Objected to on the ground it is not material to the issues here.

(Testimony of A. R. Lintner.)

The Court: The objection is overruled.

A. The duties of that Board have been to hear and review and pass upon all matters affecting the relationship between employer and employee as regards the Maritime Unions.

Q. Will you state whether or not that Board has fixed and changed and modified and done whatever was necessary in connection with bonus?

A. Yes, the Board has——

Mr. Levinson (Interrupting): Just a moment. Objected to on the ground of being leading, and the further ground that I have heretofore made, that, it is not material.

Mr. Ambler: I asked whether or not, your Honor.

The Court: I will overrule this objection.

A. Yes, the Board has issued a number of rulings on bonuses.

Q. Will you state whether or not that Board has exclusively handled the amount, time and payment of bonus since the beginning of the war to the present time?

Mr. Levinson: The same objection.

The Court: Overruled.

A. Yes, they have.

Mr. Ambler: I move the introduction in evidence of Respondent's Exhibit K.

Mr. Levinson: Objected to upon the ground that it is not material.

The Court: Are you going to connect it up?

Mr. Ambler: Yes, your Honor.

(Testimony of A. R. Lintner.)

The Court: With knowledge on the part of these Libelants or their authorized representatives? Are you going to show that either these Libelants or their authorized representatives acted under and pursuant to the principles stated in this exhibit?

Mr. Levinson: I don't see how Counsel can. These men at that time, on December 17th and 19th, were in Oriental waters.

Mr. Ambler: Your Honor, I will show that this Board, shortly after its creation, reviewed and construed existing labor agreements on various subjects, including the subject of internment bonus, and laid down what in the Board's judgment was the industry-wide agreements which had been reached on that subject, and that decision of this Board has been in effect from the time of the war until the present time; and I think that contemporaneous construction of what was the rule with regard to bonus during the internment of these men is vitally pertinent to the discussion here, this Board being an expert Board, and being formed to form that particular construction.

I will further show that there has been no objection on the part of any employer or Union as to the construction which this Board based on existing contracts.

The Court: Well, what I would like to know is this: Are you going to show evidence proving or tending to prove that these Libelants authorized their representatives to subscribe to or become par-

(Testimony of A. R. Lintner.)

ties to these declarations of principles contained in Respondent's Exhibit K?

Mr. Ambler: If your Honor will examine that, you will find that the two Unions of which these Libelants—whether they are members or not, these Libelants belonged within the unit; and when a unit is represented by a Union under the National Labor Relations Act, the agent for collective bargaining is the sole and exclusive representative of these men in collective bargaining. That is a matter of law.

The Court: Well, Mr. Ambler, do you or do you not propose to make of record in proper form something to back up your present statement?

Mr. Ambler: Yes. I mean, that is a question of law. Under the law, I will show that from 1936, these six Unions have been recognized under the Wagner Act as the sole and exclusive representative of the employees in these various units, and by law they are the sole and exclusive representative, not only for their members, but non-members.

The Court: This Court can't take judicial notice of whether or not these Libelants were members of any Union.

Mr. Ambler: I am not interested in whether they were or not. It is wholly immaterial whether they were members of these unions or not. If they belong in the class, in the unit, the agent for the unit is their sole and exclusive bargaining agent. He doesn't bargain only for his members.

(Testimony of A. R. Lintner.)

The Court: Mr. Ambler, the point is that you are only saying that. You are not offering any proof of it.

Mr. Ambler: Well, your Honor, the matter has been passed on by the United States Supreme Court.

The Court: I will reserve ruling on that.

Mr. Ambler: I would appreciate that. Counsel will agree, I think, that the agent under the Wagner Act of a unit for collective bargaining is the representative, not only of the members of the Union, but of all of the employees in the plant. But we won't discuss that, because that has been decided by the Courts.

Mr. Levinson: I understand that your Honor is reserving ruling on the admission of this exhibit?

The Court: That is right. I will hear both Counsel on it when the time comes. Apparently there is nothing to be gained in spending time on it now. It is the same old principle, that I am not bound by someone else acting for me unless you show some authority that I have given him to act for me. That is all there is to it.

Mr. Ambler: I shall cite your Honor authorities, and I shall also show the authority by the parties involved.

(Whereupon, Four Vouchers showing payment to Libelants were marked Respondent's Exhibit A-1 for identification.)

Q. (By Mr. Ambler): Mr. Lintner, handing you Respondent's Exhibit A-1 for identification, will you state what that is?

(Testimony of A. R. Lintner.)

A. These are the vouchers or records of payment to the four members of the Capillo crew that are involved in this suit.

Q. That is a statement as to the amount already paid the men when they were paid off in New York?
A. That is right.

Q. The four Libelants in this case?

A. That is correct. It is a breakdown, a detail of the amount, and is a receipt from the men of that amount being received or having been received.

Q. And that is signed by the individual Libelants in this case?

A. That is correct. There is one for each of the Libelants.

Mr. Ambler: I move the introduction in evidence of Respondent's Exhibit A-1.

Mr. Levinson: No objection.

The Court: Admitted.

Q. (By Mr. Ambler): Mr. Lintner, was the rider which was attached to the articles of the Capillo submitted to you prior to the sailing of the vessel?
A. No.

Q. Do you recall when you first saw that rider?

A. I would say it was when this controversy arose.

Q. How many vessels was the American Mail Line operating in the fall of 1941?

A. Eleven.

Q. Were the riders on the articles of other vessels, if any, submitted to you at that time?

A. No.

(Testimony of A. R. Lintner.)

Q. As general manager of the Company, why weren't these riders submitted to you at that time?

A. Well, the entire situation was under review, was under negotiation, and the rider just became a statement as between the Company and the members of the crew which, in my opinion, were contingent upon——

Mr. Levinson (Interrupting): Just a moment. I object to his interpretation of the rider. I don't think it is material.

The Court: What authority have you for that? I mean, do you wish to be heard on that, Mr. Ambler?

Mr. Ambler: Well, I think, your Honor, that this gentleman has certainly qualified himself as an expert.

The Court: He can state what his understanding was, if he had any.

Mr. Levinson: May my objection be noted to that.

The Court: The objection is overruled.

Q. (By Mr. Ambler): Will you state what, if any, was your understanding concerning the function of these riders?

A. My understanding was at the time that a rider was just a temporary understanding which was to be interpreted and determined by the results of negotiations which were under way at the time. It was not unusual for us to put on riders on articles to cover situations that were under discussion, and in every case it was the practical appli-

(Testimony of A. R. Lintner.)

cation that the results and the agreements reached in connection with those riders were what the rider meant.

Q. By "agreements reached," will you state what agreements you referred to then?

Mr. Levinson: It is understood my objection goes to all of this, your Honor, without repeating it?

The Court: Have you any objection to that?

Mr. Ambler: No, I have no objection to that.

The Court: The Court approves that.

Mr. Ambler: Will you read the question, please?

(Question was read by the reporter.)

A. I mean, the agreements as reached between the Pacific American Ship Owners Association and the various unions.

Q. And those agreements were put into writing when they were reached? A. That is right.

Q. And signed by the Association on behalf of its members, and by the Union on behalf of the ones it represented, is that correct?

Mr. Levinson: I object to that as leading. I think it goes too far.

The Court: I think that the objection is well taken.

Mr. Ambler: I think the objection is well taken. I was just trying to hurry it.

Q. (By Mr. Ambler): By whom were those contracts signed?

A. They were signed by the Pacific American

(Testimony of A. R. Lintner.)

Ship Owners Association on behalf of its members, which were the ship owners and operators, and the representatives of the Unions.

Mr. Ambler: You may cross-examine.

Cross Examination

By Mr. Levinson:

Q. Mr. Lintner, the Pacific American Ship Owners Association has a constitution or a written agreement of association, do you know?

A. Yes, I do know.

Q. Is there anything in that written agreement which prevents the various members of the Association from entering into any other agreement than that which is provided for by the Association?

A. I believe that the members of the Association agree not to do that.

Q. However, as to situations which may not be covered by rulings of the association, the individual ship companies can enter into any agreement that they desire with their crews, can they not?

A. I know of nothing that would prevent that.

Q. This Pacific American Ship Owners Association is nothing more than an Association or group where they can be commonly represented in their common problems, as far as you know?

A. That is correct. It represented its membership in all their labor activities.

Q. Now, most steamship operators on the Pacific Coast are members of that Association?

A. Yes.

(Testimony of A. R. Lintner.)

Q. Is there anything in the Association which prevents a company like the Alaska Steamship Company from entering into a separate agreement concerning its Alaska operations?

A. I would say that the Alaska Steam, like anyone else that is a member of it, has agreed not to do that.

Q. Well, as a matter of fact, to your personal knowledge, Mr. Lintner, the Alaska trade, because of the peculiar nature of that trade, has a separate agreement, has it not?

A. Yes, within the other general agreement.

Q. That is right; and when an outside vessel, who may be a member of the Association, goes into the Alaska trade, it sometimes is governed by it and many times tries to avoid being governed by it, that is true, isn't it, although still a member of the Association?

A. They might have tried to avoid it, but they wound up being governed by it.

Q. We had that situation on one occasion, did we not, Mr. Lintner? A. Yes.

Q. Now, the Northland Transportation Company, for instance, is a member of the Association, is it not? A. That is right.

Q. And the Alaska Steamship Company is a member of the Association? A. That is right.

Q. Yet what is the practice of the Northland Transportation Company with reference to its men signing articles when they go north?

A. I don't know.

(Testimony of A. R. Lintner.)

Q. Under the law, it is not necessary that seamen sailing in coastwise vessels sign written articles, is it? A. That is right.

Mr. Ambler: Your Honor, I think we are getting a little far afield here.

The Court: I would like to emphasize at this point that, however else it may be in the field of industrial relations as enjoyed by members in those relations, so far as I know, this Court is bound by rules of law and rules of contract, and that contracts are based upon promises and not upon hopes, and that the principal issue in this case is whether or not these Libelants authorized Union representatives to do something to their contract rights stated in these articles. Now, gentlemen, in my opinion that is the issue in this case. Is there some other one that the Court is overlooking?

Mr. Levinson: I don't believe so.

The Court: Now, if you will direct yourselves to that issue, it will save the Court a lot of time and save yourselves a lot of labor.

Q. (By Mr. Levinson): Now, there is no question in your mind but that the master of the *Capillo* had the authority to sign the articles?

Mr. Ambler: That is admitted.

Q. (By Mr. Levinson): At the time these men joined the vessel, you were anxious to get a crew to sail this vessel to these waters, were you not?

A. Yes.

Q. You had to get the vessel out?

A. Yes.

(Testimony of A. R. Lintner.)

Mr. Levinson: All right, that is all.

Mr. Ambler: I am admitting for the purpose of this case that the Master had the right to sign the articles. I don't want that as a general admission that might possibly be later used against me.

That is all.

(Witness excused.)

Mr. Ambler: Mr. Williams.

W. L. WILLIAMS,

called as a witness in behalf of the Respondent,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Ambler:

Q. Your name is W. L. Williams?

A. That is right.

Q. Where do you reside, Mr. Williams?

A. 2822 NE Alameda, Portland, Oregon.

Q. And what is your occupation?

A. Manager for the American Mail Line, Columbia River District.

Q. When did you join the American Mail Line?

A. December 16, 1940.

Q. Shortly after its reorganization?

A. At the time of the first opening of its office in Portland.

Q. And you have been the manager of that Portland office ever since that time?

(Testimony of W. L. Williams.)

A. I have.

Q. And you are still the manager of the Portland office? A. I am.

Q. What was your experience in the shipping business prior to your becoming the manager of the Portland office of the American Mail Line?

A. I have been connected with ships and shipping ashore and afloat since 1912.

Q. Have you been to sea? A. I have.

Q. And did you hold a license? A. I did.

Q. At sea? How long have you been employed ashore in the shipping business?

A. I came ashore in 1922.

Q. And has your experience been on the Atlantic Coast or on the Pacific Coast?

A. All on the Pacific Coast.

Q. And in what ports?

A. Portland, Grays Harbor and Seattle.

Q. With what companies were you associated during that period?

A. The old Columbia Pacific Steamship Company, which is now the States Steamship Company; the Hammond Shipping Company, and the American Mail Line.

(Whereupon, Photostatic Copy of Shipping Articles was marked Respondent's Exhibit A-2 for identification.)

Q. (By Mr. Ambler): Mr. Williams, handing you Respondent's Exhibit A-2 for identification, will you state what that is?

(Testimony of W. L. Williams.)

A. These are photostatic copies of the articles signed by the S. S. Capillo, or the crew of the S. S. Capillo, and the rider that was attached to the articles.

Mr. Ambler: I move the admission in evidence of Respondent's Exhibit A-2.

Mr. Levinson: No objection.

The Court: Admitted.

(Whereupon, Respondent's Exhibit A-2 for identification was received in evidence.)

Mr. Ambler: At this time, your Honor, I would like to move the admission in evidence of Respondent's Exhibit K, if I did not previously do so. I think I did; but if I didn't, I would like to.

Mr. Levinson: That is the one your Honor is reserving ruling on.

The Court: Ruling is reserved, because I want you to connect up some consent that these Libelants gave to the modification of their shipping contract.

Mr. Ambler: Yes, your Honor.

Q. (By Mr. Ambler): Now, Mr. Williams, referring you to respondent's Exhibit A-2, and particularly to the rider which is attached thereto, will you state whether or not that was the first time that rider had been used on articles of vessels of the American Mail Line?

A. No, it was not.

Q. When was the first time that form of rider was used?

A. In early August of the same year.

(Testimony of W. L. Williams.)

Q. Do you recall on how many vessels of the American Mail Line that particular form of rider had been used in the summer and fall of 1941?

A. I think four vessels.

Q. The Capillo was the fourth? A. Yes.

Q. Will you state where that form of rider came from? A. Originally?

Q. Yes.

Mr. Levinson: I don't see its materiality, your Honor.

The Court: I will overrule the objection, because I desire that both sides be given an opportunity to furnish the Court some evidence of the consent of these Libelants to the modification of their shipping contract. It is conceivable that there might be some connection between that objective and this inquiry.

Mr. Ambler: Will you read the witness the question?

(Whereupon, the last question was read by the reporter.)

A. It was introduced and produced to us by the Union representatives.

Q. (By Mr. Ambler): And it was used on the articles of three vessels prior to being used on the articles of the S. S. Capillo?

A. That is correct.

Q. Approximately how many vessels during the period from August to November 1st, or December 1st, 1941, signed on their crews on the Columbia River for the American Mail Line?

(Testimony of W. L. Williams.)

A. From August to November?

Q. Yes, if you recall.

A. Well, to my best recollection, about six vessels.

Q. Did six vessels sign on crews on the Columbia River? A. Yes.

Q. And on four of those, the rider to the articles, which here appears, appeared on the articles of those vessels? A. That is correct.

The Court: At some time the Court would like to know the name of those four vessels or any one of them that concerns this case, if any.

Mr. Ambler: I can refresh the witness' recollection by some information that he formerly sent me.

The Court: Do you wish to show him some document?

Q. (By Mr. Ambler): I hand you a letter written some time ago to me by yourself, and will you check over the document and see if that will refresh your memory as to the number of vessels which signed on their crews in Portland from August 1, to December 1, 1941?

A. The S. S. Crown City signed on about August 13th.

The Court: What year?

The Witness: 1941. A rider similar to the one that we are talking about on the Capillo was attached to that vessel's articles. The S. S. Colbrook signed on about August 27 of 1941; likewise a similar rider was attached to her articles. On about August 30 the S. S. Satartia signed on at Portland

(Testimony of W. L. Williams.)

and a similar rider was attached to her articles; and then the S. S. Capillo signed on on October 11 with the rider that we are now talking about.

Q. (By Mr. Ambler): Mr. Williams, do you wish at this time, then, to correct your statement that there were six vessels, to the fact that there were only four vessels?

A. Yes. But you asked me the question how many vessels were signed on from August to November.

Q. Yes.

The Court: It is clear to the Court. His final statements about it are clear to the Court.

Q. (By Mr. Ambler): Were there any other vessels signed on at Portland after November 1, 1941?

A. I do not think so.

Mr. Ambler: That is all.

The Court: I would like to know if this witness had any contact with Union representatives in connection with that voyage.

Mr. Ambler: I am going to bring that out. That is the next point.

Q. (By Mr. Ambler): Prior to the time of the war, was it customary to have riders to the articles?

A. Will you restate that?

Q. Prior to the time of the war commencing in Europe, was it customary to have riders such as this attached to the articles?

A. No, not riders such as this.

(Testimony of W. L. Williams.)

Q. When did riders having to do with bonuses first come into use?

A. I think early in 1941.

Q. Will you state the method in which they were either suggested by you or proposed to you?

A. They were proposed and suggested and submitted to us by the Union officials.

Q. When was that done?

A. Usually at the time that we started to sign on the crew.

Q. Was there discussion at the time as to whether or not the rider so proposed would be signed by the Master?

A. There was always the usual amount of confusion that goes along with the introduction of anything like that.

Q. Who would represent in that case the employer in these discussions? A. I would.

Q. And who would represent the employees, the members of the crew, in these discussions?

A. The local business agents of the Union.

Q. Were they present on board the vessel?

A. Oh, yes.

Q. Would they insist upon the inclusion of such a rider?

A. Well, that would be the purpose that they would introduce it.

The Court: Well, answer the question. Mr. Ambler wants you to answer his question.

Q. (By Mr. Ambler): Did they insist upon the introduction of this rider?

(Testimony of W. L. Williams.)

A. That is correct.

Q. And if you had declined to sign it, what would have been the result?

A. Well, in all likelihood there would have been a delay. However, the local business agent probably would refer the matter to——

Mr. Levinson (Interrupting): Well, now, just a moment. I haven't objected heretofore, but now I think we are going beyond——

The Court (Interrupting): I think that is objectionable.

Mr. Ambler: I think that is true.

Q. (By Mr. Ambler): Were there contracts in effect between the American Mail Line, represented by the Pacific American Ship Owners Association, and the Unions at this time?

A. There were.

Q. And what subjects did those contracts cover, generally speaking?

A. The general agreement would cover wages, hours and conditions.

Q. Were there from time to time modifications made to these general agreements?

A. There were.

Q. And when a ship would pay off, will you explain what governed the rights of the parties in case of dispute?

A. The existing contract.

Q. And would reference be made to that by you, representing the Company, and by the Union, representing the employees?

A. Not unless a dispute arose.

(Testimony of W. L. Williams.)

Q. I say, in case of a dispute? A. Yes.

Q. And those contracts in every case, would they govern as to who was right or wrong?

A. They would.

Q. Were negotiations pending between the employers and the Unions during the summer of 1941? A. Yes.

Q. Was the fact that such negotiations were pending well known to you and to the Unions?

A. It was well known to me.

Q. Had there been any industrial unrest in the summer of 1941 concerning the subject of bonus?

A. There was a lot of confusion.

Q. What was the nature of that confusion?

A. Well, I think that everybody knew, that was associated with the industry, that a supplemental agreement was being negotiated, principally to determine the payment of the war bonuses.

Q. Had there been changes in war bonus made in 1941, early '41?

A. I think the introduction of war bonus was established in '41.

The Court: In so far as written statements in the contract were concerned? Is that what you mean?

The Witness: I think that, if my memory serves me correctly, the original bonus applied to ships going into Japanese ports, and a bonus was paid to the crew from the time a ship called at the first Japanese port until they left the last one. Fol-

(Testimony of W. L. Williams.)

lowing that, our ships, at least, did not call at Japanese ports, as the war atmosphere was increasing and the war in Europe was a fact, so bonuses were corrected to meet the situations that arose.

Q. (By Mr. Ambler): And those bonuses were the subject of negotiations in the summer and fall of 1941?

A. That is correct. They were changed more than once.

Q. Were the results of those negotiations which existed in the summer and fall of 1941 known to you or to the members of the crew of the *Capillo* or to their representatives when you signed these articles on October 11, 1941?

A. I do not think so.

Q. The term will later be used "basic wages." Will you state what that term means?

A. The basic wages was the wages agreed upon in the original agreement which was negotiated in the fall of 1939.

Q. Will you state what is meant by the term "emergency increase?"

A. Emergency increase was an increase to the base wage.

Q. And were there more than one emergency increase?

A. Yes, I think that the original emergency increase was 10%, and it later was increased to 15%.

Q. And in the case of employees having a wage less than a certain amount, instead of a percentage, that was on a fixed amount?

(Testimony of W. L. Williams.)

A. A flat basis. In the case of the Capillo, I think it was \$17.50.

Q. \$17.50 was the case in this particular instance.

The Court: While trying to make a note of it, I have lost your very accurate statement as to what this emergency increase referred to. Did you say to the basic pay? What did you say?

The Witness: The emergency increase was an increase to the base wage.

Q. (By Mr. Ambler): It was a wage increase?

A. A wage increase.

Q. Now, will you state what was meant by the term "bonus?"

A. Bonus was an agreed sum of money to be paid for the additional dangers of going into dangerous waters and war zones.

(Whereupon, Supplementary Agreement dated October 9, 1941, between Pacific Coast Marine Firemen, Oilers, Water Tenders and Wipers Association, and Pacific American Ship Owners Association, was marked Respondent's Exhibit A-3 for identification.)

Q. (By Mr. Ambler): Mr. Williams, handing you Respondent's Exhibit A-3 for identification, will you state what that is?

A. That is a supplementary agreement between the Pacific Coast Marine Firemen, Oilers, Water Tenders and Wipers Association, and the Pacific American Ship Owners Association, dated October 9, 1941.

(Testimony of W. L. Williams.)

Q. Will you state whether or not that agreement has been in effect between your company and the Pacific Coast Firemen, etc., since its date?

A. It has.

Q. Briefly, what does that supplementary contract cover?

A. It covers such items as are not included in the original basic agreement, and it refers particularly to bonuses and war risk insurance and reimbursement in case of loss of personal effects. I think, generally, that is the idea of the agreement.

Mr. Ambler: I move the introduction in evidence of Respondent's Exhibit A-3.

Mr. Levinson: No objection.

The Court: Admitted.

(Whereupon, Respondent's Exhibit A-3 for identification was received in evidence.)

RESPONDENT'S EXHIBIT A-3

Admitted Apr. 5, 1945

This Agreement, dated October 9, 1941 by and between the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association hereinafter referred to as the "Union" and the Pacific American Shipowners Association, a corporation, acting on behalf of the companies whose names are subscribed hereto.

Witnesseth:

Whereas, the parties hereto are engaged in the negotiation of a collective bargaining contract rela-

(Testimony of W. L. Williams.)

tive to wages, hours and working conditions for members of the Union and desire to provide by collateral or supplementary agreement for bonuses payable to members of the Union on vessels going into war zones; and

Whereas, in a proceeding before the National Defense Mediation Board between certain other parties the National Defense Mediation Board published recommendations for bonuses for war risk to apply for the period hereinafter specified; the parties hereto desire to adopt and follow said recommendations;

Now, Therefore, It is agreed that said recommendations of the National Defense Mediation Board are adopted by the parties hereto and in pursuance thereto do agree as follows:

1. The following war bonus rules shall govern the parties hereto—

(a) There shall be five war risk zones; namely:

I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

II. Trans-Atlantic voyages to Russia (Archangel etc.) (Whole voyage)

(Testimony of W. L. Williams.)

III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound until recrossing the same Meridian eastbound)

IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

V. Canada (Atlantic Coast) (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port)

(b) Members of the Union shall be paid a war risk bonus at the rate of \$80 per month in the first four areas and \$33 in the fifth area provided, however, that all members of the Union entitled to receive basic monthly wages in excess of \$120, shall, in lieu of the bonuses specified above be paid at the rate of $66\frac{2}{3}\%$ of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area; a schedule of such bonuses is attached hereto and made a part of this agreement.

(c) There shall be paid to members of the Union in addition to the area bonus just provided, the following port bonuses:

(1) for the port of Suez, or any other port which is subject to regular bombing, \$100, plus \$5

(Testimony of W. L. Williams.)

per day for each day beyond five days that the vessel is in that port.

(2) for any port in the Red Sea or in the Persian Gulf not covered by paragraph (1) Supra, \$45.

The same bonuses shall be paid other unlicensed personnel.

The foregoing bonus rules shall be and remain effective until November 1, 1942 unless adjusted prior thereto pursuant to the provisions of this agreement.

Dated: Oct. 9, 1941.

PACIFIC COAST MARINE
FIREMEN, OILERS, WATER-
TENDERS AND WIPERS,
ASSOCIATION

(sgd) V. J. MALONE

PACIFIC AMERICAN SHIP-
OWNERS ASSOCIATION

(sgd) J. B. BRYAN

President

(Whereupon, Supplementary Agreement, dated October 10, 1941, between Marine Cooks & Stewards Association of the Pacific Coast, and the Pacific American Steamship Owners Association was marked Respondent's Exhibit A-4 for identification.)

Mr. Ambler: At this point I might state to your Honor that this is the supplementary agreement

(Testimony of W. L. Williams.)

which fixes the \$80 rate which is the amount for which Libelants are suing at this time, and it also fixed certain of the compensation on which the Libelants were paid off in New York in December, 1943.

The Court: It will be necessary for the Court to adjourn rather shortly, but if there is a statement or two that you wish to have the witness make before that occurs, you may inquire.

Q. (By Mr. Ambler): Handing you Respondent's Exhibit A-4 for identification, will you state what that is?

A. This is a supplementary agreement between the Marine Cooks and Stewards Association of the Pacific Coast, and the Pacific American Ship Owners Association, dated October 10, 1941.

Q. And will you state whether or not that covers the same subject matter which you described in the preceding contract? A. That is correct.

The Court: Does it affect all of the Libelants in this case?

Mr. Levinson: Only one, your Honor.

Mr. Ambler: Only one, the mess man. The first three libelants in this case are covered by A-3, they being in the unlicensed department of the engine department, two oilers and a fireman. The fourth Libelant is covered by A-4, which covers the Stewards' Department, he being a mess man.

(Whereupon, Supplementary Agreement, dated October 10, 1941, between National Organization of Masters, Mates and Pilots of

(Testimony of W. L. Williams.)

America and Pacific American Ship Owners Association, was marked Respondent's Exhibit A-5 for identification.)

Direct Examination—(Continued)

Q. (By Mr. Ambler): Handing you Respondent's Exhibit A-4 for identification, will you state what that is?

A. The supplementary agreement between the Marine Cooks and Stewards Association of the Pacific Coast, and the Pacific American Ship Owners Association, dated October 10, 1941.

Q. And will you state whether or not that covers, briefly, the same subject matter as that covered in Respondent's Exhibit A-3, which was the contract between Pacific Coast Firemen and the Pacific American Ship Owners Association which you previously identified? A. Yes, it does.

Mr. Ambler: I move the introduction in evidence of Respondent's Exhibit A-4.

Mr. Levinson: No objection.

The Court: Admitted.

(Whereupon, Respondent's Exhibit A-4 for identification was received in evidence.)

RESPONDENT EXHIBIT A-4

Admitted Apr. 5, 1945

This Agreement, dated October 10th, 1941 by and between the Marine Cooks and Stewards' Association of the Pacific Coast hereinafter referred

(Testimony of W. L. Williams.)

to as the "Union" and the Pacific American Ship-owners Association, a corporation, acting on behalf of the companies whose names are subscribed hereto.

Witnesseth:

Whereas, a collective bargaining contract between the parties dated July 5, 1940 and which has been automatically renewed until September 30, 1942 specifically provides among other things for the establishment of bonuses and other special benefits on vessels going into war zones; and

Whereas, in a proceeding before the National Defense Mediation Board between certain other parties the National Defense Mediation Board published recommendations for bonuses for war risk to apply for a period hereinafter specified in this agreement; the parties hereto desire to adopt and follow said recommendations;

Now, Therefore, It is agreed that said recommendations of the National Defense Mediation Board are adopted by the parties hereto and in pursuance thereto do agree as follows:

1. The following war bonus rules shall govern the parties hereto—

(a) There shall be five war zones; namely:

I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via India and the

(Testimony of W. L. Williams.)

Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

II. Trans-Atlantic voyages to Russia (Archangel etc.) (Whole voyage)

III. Trans-Pacific Voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound)

IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound)

V. Canada (Atlantic Coast) (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port)

(b) Members of the Union shall be paid a war risk bonus at the rate of \$80 per month in the first four areas and \$33 in the fifth area provided, however, that all members of the Union entitled to receive basic monthly wages in excess of \$120, shall, in lieu of the bonuses specified above be paid at the rate of 66 2/3% of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area; a schedule of such bonuses is attached hereto and made a part of this agreement.

(Testimony of W. L. Williams.)

(c) There shall be paid to members of the Union in addition to the area bonus just provided, the following port bonuses:

(1) for the port of Suez, or any other port which is subject to regular bombing, \$100, plus \$5 per day for each day beyond five days that the vessel is in that port.

(2) for any port in the Red Sea or in the Persian Gulf not covered by paragraph (1) Supra. \$45.

The same bonuses shall be paid other unlicensed personnel.

The foregoing bonus rules shall be and remain effective until November 1, 1942 unless adjusted prior thereto pursuant to the provisions of this agreement.

2. The following machinery for making equitable future adjustments shall govern the parties hereto—

(a) Either party may ask for a change, an addition to, or subtraction from the present war bonus rules set forth above if the present situation is changed by an Act of Congress, executive action, the spread or contraction of the area of hostilities in the Eastern or Western hemisphere, the entry into the war or withdrawal from the war of belligerents, or the rise or fall of sinkings of American vessels. Such proposed change shall be limited to the areas where conditions are alleged to have changed.

(Testimony of W. L. Williams.)

(b) The party asking for the change will present a request in writing to the party from whom the change is sought. Meetings shall be held at once. If agreement between them is not reached within one week after the date of such request either party may present the matter to the United States Department of Labor, Division of Conciliation, for conciliation. If conciliation is not successful within one week after the matter has been presented to the Division of Conciliation, the Director of the Division may then refer the matter to a Board composed of three disinterested parties to be appointed by the President of the United States. Such Board shall have power to make recommendations.

(c) In the event the parties are unable to agree concerning war bonus rules which shall apply on and after November 1, 1942, the procedure set forth in subdivision (b) of this Section 2 shall be followed in determining the same.

3. This agreement shall remain in effect until November 1, 1943.

4. War Risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement.

In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid

(Testimony of W. L. Williams.)

to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

5. During the period of these recommendations there shall be in connection with and on account of war bonus issues, no lockout, strike, slow-down, or like action by either owners or men represented by the parties hereto.

6. The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles.

7. If any dispute shall arise concerning interpretation of said recommendations of the National Defense Mediation Board or any provision of this agreement and if the parties cannot adjust any dispute by agreement then either party may refer it to the Division of Conciliation for conciliation and if conciliation fails either party may refer the

(Testimony of W. L. Williams.)

matter to the three-man Board referred to in paragraph 2 (b) hereof for interpretation.

Dated: October 10, 1941

MARINE COOKS AND STEWARDS' ASSOCIATION OF
THE PACIFIC COAST

(Sgd.) E. F. BURKE

PACIFIC AMERICAN SHIP-OWNERS ASSOCIATION

(Sgd.) J. B. BRYAN

President

Acting on behalf of the steamship lines named below:

Admiral Oriental Line

American-Hawaiian Steamship Company

American Mail Line

American President Lines, Ltd.

Alaska Steamship Company

Alaska Transportation Company

Coastwise Pacific Far East Line

W. R. Grace & Co. (as Agents for Grace Line, Inc. Pacific Coast West Coast Mexican Central American Panama Service of Grace Line, Inc.) and (Pacific Coast South American Service of Grace Line, Inc.)

Luckenbach Gulf Steamship Company, Inc.

Matson Navigation Company

The Oceanic Steamship Company

McCormick Steamship Company (East Coast-

(Testimony of W. L. Williams.)

South American Service) (Pacific Coast-Porto Rico-West Indies Service) (Intercoastal Service)

Northland Transportation Company

Pacific Lighterage Corporation

Pacific Republics Line (Moore - McCormack Lines, Inc.)

Santa Ana Steamship Company

States Steamship Company

Pacific-Atlantic Steamship Company (Quaker Line)

Sudden & Christenson (Arrow Line-Intercoastal Service)

Shepard Steamship Company

The Union Sulphur Company, Inc.

Weyerhaeuser Steamship Company

The Court: A-5 is still before the witness and the Court.

Q. (By Mr. Ambler): Handing you Respondent's Exhibit A-5, will you state what that is?

A. A supplementary agreement between the National Organization of Masters, Mates and Pilots of America, West Coast Local No. 90, and Pacific American Ship Owners Association, dated October 10, 1941.

Q. Will you state whether that contract, in substance, covers the same subject matter as the previous contract, Respondent's Exhibit A-4, which you have just identified? A. It does.

Mr. Ambler: I move the introduction in evidence of Respondent's Exhibit A-5.

Mr. Levinson: I object to the introduction of A-5, your Honor. It involves the Masters, Mates and Pilots, and there are no masters, mates and pilots involved in this proceeding.

Mr. Ambler: In connection with this case, your Honor, your Honor will appreciate that this has to do with the shipping industry, with a vessel on which there were members of six different unions; and I wish to show the contracts which covered the subject matter, as it throws a light on what was the situation which existed at the time these articles were signed.

If there is any question in your Honor's mind, I wish your Honor would reserve ruling at this time. This is an admiralty case, and, as your Honor appreciates, the Court has wide latitude.

The Court: Since the Court doesn't at this time see plainly its materiality, I will reserve ruling and let Counsel further advise the Court of that later.

Mr. Ambler: May I have, your Honor, A-6, A-7 and A-8 marked at this time.

The Court: That may be done.

(Whereupon, Supplementary Agreement, dated October 15, 1941, between Marine Engineers Beneficial Association and Pacific American Ship Owners Association, was marked Respondent's Exhibit A-6 for identification.)

(Whereupon, Supplementary Agreement,

(Testimony of W. L. Williams.)

dated October 16, 1941, between American Communications Association and Pacific American Ship Owners Association, was marked Respondent's Exhibit A-7 for identification.)

(Whereupon, Supplementary Agreement, dated October 9, 1941, between Sailors Union of the Pacific and Pacific American Ship Owners Association, was marked Respondent's Exhibit A-8 for identification.)

The Court: Do you have reason to believe that they are all in the same category?

Mr. Ambler: A-5 covers the agreement between the Masters, Mates and Pilots and the Pacific American Ship Owners Association; A-6 covers the Marine Engineers Beneficial Association; A-7 covers the supplementary contract with the American Communications Association, which is the wireless men; and A-8 is the supplemental contract between the Sailors Union of the Pacific and the Pacific American Ship Owners Association.

Mr. Levinson: I will admit that the witness will so testify as to their identities, on your statement that they are the same as the preceding documents.

Mr. Ambler: Will you also agree that he will testify that the general subject matter of the contracts is the same as he has previously testified?

Mr. Levinson: I will so agree.

Mr. Ambler: Also, all of those contracts are effective October 1, 1941. I will have the witness——

(Testimony of W. L. Williams.)

Mr. Levinson: (Interrupting) We can read the date into the record.

The Court: Will there be objection as to A-8?

Mr. Levinson: Yes, the same objection.

Mr. Ambler: On the question of the effective date, the contracts speak for themselves. I don't think it is necessary to read them.

The Court: Is it denied by Libelants that they were members of the Sailors Union of the Pacific?

Mr. Levinson: I think it is admitted in this case that they were not. We have three firemen, your Honor, and a steward, and the Sailors Union of the Pacific covers only the deck gang.

Mr. Ambler: I might say in this connection, your Honor, that the contracts which have just been identified, A-3 to A-8 inclusive, are the supplemental contracts which were made by the Pacific American Ship Owners Association with the six Maritime Unions. The Libelants in this case, three of them, the two oilers and the fireman, belonged to the Marine Firemen. That contract is one of those six which have been introduced.

The Court: Is it A-3?

Mr. Ambler: A-3, and A-4 is the agreement with the Stewards, of which the messman was a member. When I say he was a member, I do not know whether he was a member or not; but the Union which represented him was the exclusive collective bargaining agent for all in that collective bargaining unit, which included those in the black gang, or the engineers, unlicensed men in the engineer's

(Testimony of W. L. Williams.)

gang, and those persons who were employed in the Steward's Department.

Q. (By Mr. Ambler): Mr. Williams, this morning I asked you concerning the dates of certain basic agreements made by the Pacific American Steamship Owners Association on behalf of its members with the various Marine Unions, and the dates of supplements to those. You were a little vague at that time as to the dates, the exact dates of these contracts. Have you since that time refreshed your recollection as to the dates of the basic agreements and of the supplemental agreements? A. I have.

Q. Have you in your hand there a list of those contracts, giving the dates of those contracts and supplemental agreements? A. I do.

Q. Will you please give me the dates of the basic agreements and supplemental agreements between the Pacific American Steamship Owners Association, acting on behalf of the American Mail Line and others, and the six Maritime Unions?

General basic agreements were signed with the six maritime unions on the following dates:

Masters, Mates and Pilots—December 30, 1939.

Marine Engineers Beneficial Association—May 1, 1940.

American Communications Association (Radio Operators)—July 13, 1940.

Marine Cooks and Stewards—July 5, 1940.

Marine Firemen, Oilers, etc.—October 7, 1939.

(Testimony of W. L. Williams.)

Sailors' Union of the Pacific—October 10, 1939.

These general contracts provide for wages, working conditions and were the overall agreement between the parties. The first supplementary agreements which covered an emergency wage increase was signed with the following unions on the following dates:

Masters, Mates and Pilots—May 2, 1940.

Marine Engineers Beneficial Association—May 1, 1940.

Marine Cooks—July 5, 1940.

Marine Firemen—April 30, 1940.

Sailors Union—April 30, 1940.

These supplementary agreements with the first two unions representing licensed officers provided for a ten per cent emergency increase in basic wages; for a war bonus of twenty-five per cent of basic wages and emergency increase to be paid from the time the vessel arrived at the first Japanese port westbound until its departure from the last Japanese port eastbound. There was no such supplementary agreement for the radio operators at this time. In the case of the last three unions representing the unlicensed personnel there was a flat \$10.00 a month emergency increase for those receiving a wage under \$100.00 a month and a ten per cent emergency increase for those receiving wages over \$100.00 a month. The bonus provision was the same as for licensed officers.

A second supplementary agreement was signed with the unions on the following dates:

Masters, Mates and Pilots—Feb. 10, 1941.

(Testimony of W. L. Williams.)

Marine Engineers—February 10, 1941.

Marine Cooks—February 10, 1941.

Marine Firemen—February 10, 1941.

Sailors Union of the Pacific—February 10, 1941.

By this second supplementary agreement, the ten per cent emergency increase in wages was raised to fifteen per cent of basic wages. Also the twenty-five per cent bonus was extended to cover the period from the time a vessel passed the 160th Meridian westbound until she crossed the 160th Meridian eastbound. In the case of the three unions representing unlicensed personnel, the emergency increase was raised from \$10.00 per month to \$17.50 for those earning wages under \$120.00 a month. For those earning over \$120.00 a month, there was an increase from ten per cent of basic wages to fifteen per cent of basic wages as in the case of licensed personnel. Unlicensed personnel earning under \$120.00 a month received a flat \$30.00 a month bonus and those earning wages over \$120 a month were granted bonus of twenty-five per cent from the 160th Meridian to the 160th Meridian as in the case of licensed officers.

A third supplementary agreement was entered into with the five maritime unions other than the Masters, Mates and Pilots under date of May 19, 1941. It provided no increase in wages. For members of the Marine Engineers and Radio Operators this new agreement raised the bonus to 50% of basic wages from the time the vessel crossed the 160th Meridian westbound to recrossing of the same Meri-

(Testimony of W. L. Williams.)

dian eastbound. In the case of members of the three unions representing unlicensed personnel bonus was raised to a flat \$60.00 a month for those earning wages under \$120.00 a month and fifty per cent of basic wages for those earning wages in excess of \$120.00 a month, the bonus covering the period from the time the vessel passed the 160th Meridian westbound until the vessel recrossed the same Meridian eastbound. All these supplemental agreements required the carrying of war risk insurance on the crew members in the sum of \$2,000.00 each.

A fourth supplementary agreement was entered into with the six maritime unions under the following dates:

Masters, Mates and Pilots, October 10, 1941.

Marine Engineers, October 15, 1941.

American Communications, October 16, 1941.

Marine Cooks, October 10, 1941.

Marine Firemen, October 9, 1941.

Sailors Union, October 9, 1941.

Mr. Ambler: Your Honor, I might say at this time that the fourth supplemental agreements are the contracts which have been identified by this witness, being A-3, A-4, A-5, A-6, A-7 and A-8. They have already been introduced in this case, and consequently I do not think it is necessary to ask the witness.

The Court: They have been marked for identification.

Mr. Ambler: They have been marked for identification.

(Testimony of W. L. Williams.)

Q. (By Mr. Ambler): Now, will you state whether or not the basic contracts between the Pacific American Ship Owners Association and the six Maritime Unions were changed in the fall of 1941?

New basic contracts were negotiated between Pacific American Shipowners' Association and the six maritime unions on the following dates:

Masters, Mates and Pilots, December 12, 1941.

Marine Engineers Beneficial Association, November 28, 1941, January 15, 1943.

American Communications Association, November 18, 1941.

Marine Cooks, October 31, 1941.

Marine Firemen, October 10, 1941.

Sailors' Union, November 4, 1941.

Q. (By Mr. Ambler): Mr. Williams, referring to these contracts and the supplemental agreements which you have described and identified, were the crews of the various vessels of the American Mail Line which sailed out of the Columbia River governed by those contracts and supplemental agreements?

A. They were.

Q. And did you pay the crews in accordance with those? A. We did.

(Whereupon, Computation of Compensation was marked Respondent's Exhibit A-9 for identification.)

Q. (By Mr. Ambler): Handing you for identification Respondent's Exhibit A-9, will you state what that is?

(Testimony of W. L. Williams.)

Respondent's Exhibit A-9 is a recapitulation of the method of computing the wages paid to the four libelants. The first column to the left under the heading "Wages and Emergency Increase" shows the wages of the Oilers and Firemen computed in accordance with the general basic wage agreement of October 7, 1939, with the Marine Firemen's Union; also the wages computed for the Messmen on the basic agreement with the Marine Cooks dated July 5, 1940.

The second column shows the emergency increase granted February 10, 1941, to all unlicensed personnel earning less than \$100.00 a month of \$17.50 per month.

The third column shows the actual figure shown on the Shipping Articles of the vessel, respondent's Exhibit A-2.

The fourth column shows the actual compensation paid to the four libelants based upon the new basic agreements negotiated with the unions under date of October 10, 1941, in the case of the Marine Firemen, and October 31, 1941, in the case of the Marine Cooks. Below this computation under the heading "War Bonus" is shown the amount of bonus and war risk insurance computed under the supplementary agreements of May 19, 1941, and the subject matter as changed by the fourth supplementary agreements of October, 1941.

Q. (By Mr. Ambler): The \$60 a month was fixed by the supplemental agreement of May 19, 1941, to which the articles referred, is that correct?

(Testimony of W. L. Williams.)

A. That is correct.

Q. And there was also under that same supplemental agreement, all of those agreements of May 19, 1941, a provision that war risk insurance would be placed on the lives of all those members, of \$2,000 each, is that correct? A. That is correct.

Q. Then in the compensation paid to these men in New York, they were paid at \$80 a month?

A. \$80 a month.

Q. Under the supplemental agreement of October 9, 1941? A. And also \$5,000 insurance.

Q. And they also were paid an attack bonus?

A. An attack bonus of \$100.

Q. Which was not in the previous contract?

A. That is correct.

The Court: It is surprising to the Court that you have to go through such a circuitous route to establish whether or not the Libelants authorized the modifications of their shipping articles agreement.

Mr. Ambler: Your Honor, I am doing this to show that for over a period of years, all members of crews of all vessels, including those of the American Mail Line, have conducted all of their negotiations by the unions representing employees on one side, and by the Association on the other. In this particular case the rider to the articles specifically provides that the parties would be—the rider to the articles which is here involved, which is signed before the United States Commissioner by the men and the Master, provides as follows:

(Testimony of W. L. Williams.)

(Argument by Mr. Ambler and Mr. Levinson.)

The Court: Now you may proceed.

(Whereupon, Copy of Decision 2 of Maritime War Emergency Board was marked Respondent's Exhibit A-10 for identification.)

Mr. Ambler: That, your Honor, I think your Honor may wish to reserve ruling on. That is a copy of Decision 2 of the Maritime War Emergency Board, which was attached to the exceptions earlier filed in this case; and I think, for the convenience of the parties, it would be better to have it in the record, because I am going to refer to it at a later time.

The Court: Was that Board there mentioned in connection with that Decision 2 the identical same Board mentioned in that Exhibit A attached to the answer to the amended libel?

Mr. Ambler: It is, your Honor. That is Decision 2 of the Maritime War Emergency Board, is it?

Mr. Levinson: If you say so, that is satisfactory with me, as far as a copy is concerned.

Mr. Ambler: Yes.

(Whereupon, Decision 5 revised of the Maritime War Emergency Board was marked Respondent's Exhibit A-11 for identification.)

Q. (By Mr. Ambler): Referring to Respondent's Exhibit A-11, will you state whether or not that is Decision 5, revised, of the Maritime War

(Testimony of W. L. Williams.)

Emergency Board, the same Board which delivered the Decision 2 just identified by you?

A. That is right.

Mr. Ambler: I move the introduction in evidence of Exhibits A-10 and A-11.

Mr. Levinson: I object to the two on the same grounds as I objected to the statement of principles, Exhibit K. I objected to Exhibit K on the ground that it was not material, and your Honor reserved ruling on Exhibit K.

The Court: Do you think that A-10 and A-11 have no materiality except in so far as they may be related to K?

Mr. Levinson: Yes. I think Counsel will admit that those are decisions under K, decisions by the Board.

Mr. Ambler: Yes, that is correct. They are decisions under it.

The Court: I will reserve ruling.

Mr. Ambler: I say they are material, but they are decisions under the Board.

The Court: Ruling is reserved on A-10 and A-11.

(Whereupon, Original Decision 5 of Maritime War Emergency Board was marked Respondent's Exhibit A-12 for identification.)

The Court: Will you submit this A-12 to opposing counsel? I want him to see it.

Mr. Levinson: I have seen it, your Honor.

The Court: Do both of you agree as to what it

(Testimony of W. L. Williams.)

may be called so that one may apply a name to it, an identifying name to it in his notes?

Mr. Ambler: Those are certain decisions of the Maritime War Emergency Board, the same board and the only board which is discussed in this case.

The Court: But how are you going to distinguish it from some other decision? What do you call it?

Mr. Ambler: Decision No. 5.

The Court: Is this the original No. 5, and A-11 was a revised one?

Mr. Ambler: Yes, that is right.

The Court: So you can call this original No. 5?

Mr. Ambler: Yes.

(Whereupon, an Article from Monthly Labor Review, published by United States Department of Commerce, was marked Respondent's Exhibit A-13 for identification.)

Mr. Ambler: Exhibit A-13, your Honor, is an article from the Monthly Labor Review, published by the United States Department of Commerce, which discusses the matter of war bonus to sailors during this war. As an official Government publication, I wish to move its admission into evidence.

Mr. Levinson: Objected to on the ground it is not material. It is someone else's article and his own analysis of it.

The Court: In the common parlance, I might say, "You have got me."

Mr. Ambler: I think, your Honor, a Government publication on a matter of this kind is admissible in evidence for what it may be worth. I don't

(Testimony of W. L. Williams.)

think it is binding on the Court; but, as a matter of general information, I think it is admissible, and I would appreciate the Court's reserving ruling on it if there is any question in the Court's mind.

Mr. Levinson: I will be glad to present my position on that, your Honor.

The Court: I would rather both of you would reserve your fire until you get some good law that you think supports your position on it. I would rather have some good authorities on it one way or the other.

Mr. Ambler: I might say, your Honor, that an examination of the decisions of the United States Supreme Court are replete with matter of the same general character which has a general bearing on the industry. That is the only reason it is introduced.

The Court: I realize that it is a common thing for those gentlemen who might be classed as the pedagogical members of the Court to refer to a matter of this sort, but I am not so sure but what they do not have some means of access to such articles that is not common to this court. I am not certain in my own mind as to just how they get those matters before them every time. They may have a way of getting them before them that this Court doesn't have access to.

Mr. Ambler: The article in question came from this volume. That is just an excerpt. I don't think there is any question as to the source of the exhibit.

Mr. Levinson: No. There is a lot of question as

(Testimony of W. L. Williams.)

to the substance on some of the items that appear in it, though.

Mr. Ambler: Your Honor, could we——

The Court (Interrupting): Could you wait just a moment. Were you about to ask for a recess?

Mr. Ambler: There is just one more question I wish to ask the witness.

The Court: Will you wait just a moment, please.

Now you may make your statement or ask your question, Mr. Ambler.

Mr. Ambler: You may examine.

Cross Examination

By Mr. Levinson:

Q. Mr. Williams, of the four vessels which sailed from Portland within the period of time in which the Capillo left,—the Crown City, Colbrook, Satar-tia and Capillo—were there any of the other ves-sels sunk? A. Of those four?

Q. Yes, outside of the Capillo?

A. Well, subsequently?

Q. Well, that is, on this particular voyage, on these voyages mentioned.

A. Not on those voyages, no.

Q. You may have lost one or two of them later?

A. Yes.

Q. Were any of the members of the crew of these four vessels interned, other than those of the Capillo? A. Not that I know of.

Q. This is the only one where internment be-comes a factor? A. That is right.

(Testimony of W. L. Williams.)

Q. And as far as you know, that was the first one in your experience, in your Company's experience?

A. That is correct.

Q. Now, isn't it true, as far as the general method of signing on crews is concerned, that you have your basic agreements, so-called; the men appear before the Commissioner and sign on, and frequently accompanied by a representative of the Union; but the agreement which they finally sign, the articles, as far as the men are able to ascertain, is the agreement which follows their so-called Union agreement?

A. That is substantially right.

Q. In other words, the Union agreement is not the contract of employment between the men and the ship, that is correct, isn't it?

A. The articles usually show the basic wages.

Q. Yes.

A. And all of that, but——

Q. (Interrupting): The articles are the contract of employment, that is correct, is it not?

A. That is correct.

Q. And the way they arrive at the substance of the articles, where they finally agree upon it, are the terms of the Union agreement?

A. Yes, but there are things that they——

Q. (Interrupting): You just answer my questions.

Mr. Ambler: Just a moment. Let the witness answer the question.

(Testimony of W. L. Williams.)

Mr. Levinson: I know, but he can answer my question yes or no.

The Court: I think, if it is capable of receiving a direct answer, you ought to make the answer direct and responsive; and then, if you feel, in order to make it full and clear and fair, that you should make an additional statement, you will be given that opportunity.

Mr. Levinson: Will you read the question.

(Whereupon, the question was read by the reporter.)

A. Yes.

Q. That is correct, isn't it? A. Yes.

Q. Now, it is true that sometimes there is something ambiguous in the articles, or they may leave something for some further determination, is that correct?

A. There is nothing ambiguous about the articles themselves.

Q. All right. They just speak for themselves. That was the contract of your ship at that time?

A. But I don't care to answer it that way. I would like to answer it this way, that there are other conditions that do not appear in the articles which we are governed by, namely, the contracts existing between the ship owner and the Unions, which do not appear in the articles whatsoever.

Q. As far as the members of this crew were concerned, however, their contract is evidenced by these articles, is not that correct?

(Testimony of W. L. Williams.)

A. That was not the case, because the wages, for instance, shown on the articles were not the wages that governed in paying off the men, because the wages were increased by supplemental agreements after the articles were signed, and for which the rider provided for.

Q. All right. Then that was because it appeared in the articles that if there was any increase of wages, the men were to get the benefits of that, is that not correct? A. Correct.

The Court: May I ask you this: Was the compensation actually paid to and received by these Libelants at a rate greater than stipulated in the articles signed by them?

The Witness: It was, your Honor.

Mr. Levinson: By \$10 a month.

The Court: And why was that? Why was that result accomplished?

The Witness: Because of the supplemental agreements that were negotiated with the Union after the articles were signed.

The Court: Is there any reference to it in the articles?

The Witness: Except the provision in the rider that provides for whatever the negotiation provided for, the men would get the benefit of it.

The Court: Is it your contention that the rider makes possible the appropriate payment to the Libelants of the increased wages received by them?

The Witness: Yes, your Honor.

(Testimony of W. L. Williams.)

The Court: You may further inquire.

Q. (By Mr. Levinson): At the time this rider was signed, which was dated October 11, as a matter of fact, the supplemental agreements as to increased pay were already in effect, but the men didn't know about it at that time?

A. Neither the men nor did we know about them.

Q. That is right.

Mr. Ambler: Also certain were not in effect, because the dates show that some of them were signed after the articles.

Mr. Levinson: That is the provision which states that it is further agreed that in the event of any increase in pay, overtime or war bonus.

Q. (By Mr. Levinson): It is because of that provision that you paid the additional \$10 per month? A. That is correct.

Q. Now, up to the time that these articles were signed, and in discussing all of the various supplemental agreements and the basic agreements, was there anything in any of those supplemental agreements or basic agreements which related to the pay of bonus or wages to members of the crew in the event of the destruction of the ship and the internment of the men? Up to the last month was there anything?

A. I don't quite understand the question.

The Court: The last one, point to it. What is its identity?

(Testimony of W. L. Williams.)

Mr. Levinson: Up to the October 11th agreements.

Q. (By Mr. Levinson): Up to the supplementary agreements, Respondents Exhibits A-3 and A-4, one being dated October 9, 1941, the other being dated October 10, 1941, was there anything in any of the preceding agreements which related to the payment of a war bonus or wages while the men were interned? A. Not that I know of.

Q. Well, if I tell you that I have examined these agreements and the copies Mr. Ambler provided me, and if I say I was unable to find it—and I don't believe there are any more, is that correct?

Mr. Ambler: That is true. The first time that was provided for was in the contract with the licensed officers, made August 16, 1941.

Mr. Levinson: All right.

Q. (By Mr. Levinson): But as far as these men are concerned there was never any discussion about the payment of wages while these men were interned, prior to the time they signed these articles, is that correct? Or any agreement, lets put it that way. There was discussion.

A. We didn't know what the agreement was when we signed these articles, and that was the reason why it became necessary to put a rider on the articles.

Q. All right. I will grant you that, but on the one subject of payment to the men while they were interned, in the event of the destruction of the

(Testimony of W. L. Williams.)

vessel, am I correct when I say that was never the subject of any prior agreement, prior to the time the men signed the articles?

A. I cant say that it was.

Mr. Levinson: Will you so stipulate with me?

Mr. Ambler: Yes, I agree with you.

I also have to say, however, that that subject was the subject of very, very acute negotiation throughout that period. There had been no actual agreement reached on it prior to the October agreements, that is correct; but it was the subject of negotiation.

The Court: Will one side or the other give the witness an appropriate opportunity to state whether or not the detail was left open by the form of the reference and rider attached to the shipping articles?

Mr. Levinson: It goes further than that, your Honor. I will try and state it again this way:

Q. (By Mr. Levinson): The shipping articles, Mr. Williams, were signed on October 11, 1941. That is the rider which is at issue here. The shipping articles specifically provide, according to that rider, for the payment of war bonus during the time that the men are interned, do they not, sir?

A. That is correct.

Q. Now, is it not a fact that prior to October 11, 1941, the date that these articles were signed, to your knowledge, there was never any agreement which provided for the payment of war bonus while the men were interned?

(Testimony of W. L. Williams.)

A. I don't know of any.

Mr. Levinson:: Well, will you stipulate that is a fact?

Mr. Ambler: As far as I know, there were none with these particular two unions.

Mr. Levinson: Yes, with the Unions involved here.

Mr. Ambler: That is right.

Mr. Levinson: In other words, this is the first time there ever appeared a definite agreement where the men were to be paid war bonus while they were interned, which is the issue here.

The Witness: Or the ships that preceded her.

The Court: What do you mean, this was the first time?

Mr. Levinson: The October 11 articles.

The Court: In evidence as what exhibit?

Mr. Levinson: As Respondent's Exhibit A-2.

Q. (By Mr. Levinson): The rider, Respondent's Exhibit A-2, provides for the payment of bonus while the men are interned, that is correct, is it not?

A. That is correct.

Q. Prior to the execution of this rider, was there any agreement between the Union and the Pacific American Ship Owners providing for payment of war bonus while the men were interned?

A. Not that I know of, but there were three ships that preceded this that carried the same rider.

Q. Very well, but there was no union agreement between the Union and the Association?

A. Not that I know of.

(Testimony of W. L. Williams.)

The Court: Prior to or after the time when the shipping articles were signed with the rider attached as a part thereof, did the Unions, representing these Libelants, enter into any agreement with the Respondent in this case or its representative touching the subject matter here in suit?

The Witness: Yes, your Honor.

The Court: When was that?

The Witness: Under the Statement of Principles.

Mr. Ambler: In this contract.

Mr. Levinson: October 9 and 10.

Mr. Ambler: October 9 and 10.

The Court: Do Counsel on both sides agree that the answer to the Court's question is as stated by Mr. Ambler?

Mr. Levinson: Exhibits A-4 and A-5.

Mr. Ambler: Exhibits A-4 and A-5.

Mr. Levinson: No, Exhibits A-3 and A-4?

Mr. Ambler: Yes, that is right. Exhibits A-3 and A-4 have a particular provision covering that particular situation.

The Court: And, of course, by virtue of an agreement signed on behalf of Libelants and on behalf of Respondent, subsequent to the date of these shipping articles.

Mr. Levinson: The men didn't even know about it at the time.

The Court: Is it agreed by Counsel for both sides that the Court may take as stipulated that Respondent's Exhibits A-3 and A-4 are the agree-

(Testimony of W. L. Williams.)

ments as to bonus contemplated by the rider attached to the shipping articles, which articles are Respondent's Exhibit A-2?

Mr. Levinson: No, I won't say they are the agreement as to bonus.

The Court: Is anything else sued for in this case?

Mr. Levinson: But I will agree with your Honor that they discuss this problem, but we still haven't come to the—I do not admit the issue of the authority of the agreement.

The Court: At this point we will take about a five-minute recess.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Levinson): Mr. Williams, were you present actually at the time these articles were signed, actually present?

A. I am reasonably sure that I was.

Q. You have no recollection of it, though?

A. I have no recollection.

Q. And at that time, of course, the possibilities of war and the likelihood of internment were some of the things that were considered by the men?

A. That is correct.

Q. And it was discussed. Now, as a matter of fact, while your ship was a Union vessel or Union ship, there are other Unions that sail on ships in the Pacific Coast, for instance, the National Mari-

(Testimony of W. L. Williams.)

time Union? There are other Unions involved besides these right here, are there not?

A. That is right.

Q. And there are other Union agreements? The National Maritime Union has some agreements which are involved on the Pacific Coast ships?

A. Not with Pacific Coast ships.

Q. Well, ships that sign on on the Pacific Coast?

A. That is correct, yes.

Q. And the Marine Cooks & Stewards now are also involved in some controversy with the Sailors Union of the Pacific? The Seafarers' International Union also have some marine cooks, don't they?

A. There are competitive unions, yes.

Q. Yes. So that when you come right down to it, there really is no binding union agreement that covers all men and all ships?

A. Well, I would answer that this way, that there are agreements that cover all ships.

The Court: You mean all departments in all ships?

The Witness: All departments in all ships. I don't know of any ships that are sailing that are not governed by some Union contract or other.

The Court: As to some one or all of its departments, is that what you mean?

The Witness: Yes, your Honor.

Q. (By Mr. Levinson): But they vary from time to time and from ship to ship, do they not?

A. That is correct, depending on the ship.

(Testimony of W. L. Williams.)

Q. And in the final analysis, when you settle your so-called beefs, as the sailors refer to them when they come ashore at the end of a trip, they settle them on the basis of the articles and on the basis of the so-called Union agreement?

A. That is correct.

Q. And many times they result in a compromise of the position of both the ship and the men? It is a give and take proposition?

A. If I may explain it this way, there are always differences of opinion on interpretation.

Q. That is right.

A. And if they cannot be settled directly with the men by the Company involved, they are sometimes referred to higher up, the Union officials and the officials of the Ship Owners Association; and in the event that the dispute is not settled then, it can go to arbitration.

Q. And sometimes it gets into court?

A. Sometimes it gets into court.

Q. In other words, it is each individual problem, each individual ship with its own crew, and you settle it on that basis? You never settle these disputes on an industry-wide basis when you finally come down to it?

A. Well, that is not correct, because due to this Maritime War Emergency Board, they have endeavored to set up that Board so that they will make conditions uniform, so that there will not be the question of whether one ship has a different condition or interpretation than another ship, and

(Testimony of W. L. Williams.)

they have endeavored to make all of these interpretations uniform for the entire nation and all ships.

Q. That is what you try to do?

A. That is what it is now.

Q. But you do that by trying to settle each problem in accordance with that general rule, if you can?

A. We endeavor to keep out of trouble, if we can.

Mr. Levinson: I think that it all.

Redirect Examination

By Mr. Ambler:

Q. The American Mail Line in the fall of 1941 had all of its vessels covered by agreements with the six Maritime Unions which are here mentioned?

A. That is correct.

Q. And it had no contracts with any other Unions during that period?

A. It did not.

Q. And all of its employees, seagoing employees, were covered by agreements with these six unions, is that correct?

A. That is correct.

Mr. Levinson: Let me ask just one more question. Where in your opinion—you just tell the Court—was there any authority given by the members of this crew to anybody to make any adjustment on their agreement afterwards?

Mr. Ambler: I submit the agreement speaks for itself.

(Testimony of W. L. Williams.)

The Court: If he wishes to take the agreement and point that out, if he can, I think Counsel is entitled to have him do so.

Mr. Ambler I have no objection.

Mr. Levinson: That seems to be the issue in your Honor's mind. Maybe this man might be able to assist us.

Mr. Ambler: I think the last paragraph is——

Mr. Levinson: (Interrupting) Well, let's see.

The Court: Will you read the question, Mr. Reporter.

(Whereupon, Mr. Levinson's question was read by the reporter.)

The Witness: Well, it is my opinion that, in the first place, the rider to the articles was introduced by the Union officials, and not necessarily by the men themselves, so the men recognized that the Unions were acting on behalf of them when the rider was first presented. So, with the reading of the first paragraph and the last paragraph, in which they agree to be bound by any supplemental agreements negotiated between the Ship Owners and the Unions, that that in itself proved that the men were giving the Union authority to act on their behalf.

The Court: The first and last paragraphs of the rider, do you mean?

The Witness: Of the rider.

The Court: To the shipping articles?

The Witness: To the shipping articles, yes.

(Testimony of W. L. Williams.)

Mr. Levinson: Now, where, outside of these shipping articles, do you know of any authority given by the members of the crew of this ship to anybody, outside of these articles, to represent them?

The Witness: I know of none.

Mr. Levinson: You know of none?

The Witness: No.

Mr. Levinson: And whatever rights that you claim to change them, arise out of the articles, is that right?

The Witness: Arise out of the agreement in the articles.

Mr. Levinson: Okeh, that is all. I have nothing further.

Q. (By Mr. Ambler): And all of your crews of all of your ships, during 1941 and before, did all of their collective bargaining through the Unions with the Association which represented your company? A. That is true.

Q. And they were paid in accordance with these various agreements which were made between the unions, acting on behalf of the employees, and the Association, acting on behalf of the Employer, is that correct?

Mr. Levinson: That is so leading, your Honor.

The Court: Try to avoid leading.

Mr. Ambler: I am trying, your Honor, to speed up this thing.

Q. (By Mr. Ambler): Is that correct?

A. That is correct.

(Testimony of W. L. Williams.)

The Court: I will have to sustain the objection.

Q. (By Mr. Ambler): Will you state whether or not all crews of all vessels of the American Mail Line, during the period of 1940 and '41, were governed by agreements and supplemental agreements entered into by the Pacific American Ship Owners Association on behalf of the employer, and the six Maritime Unions representing the seagoing personnel? A. They were.

Mr. Ambler: That is all.

Mr. Levinson: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Ambler: Mr. Lintner; I want to call Mr. Lintner for one question.

The Court: You may do that.

A. R. LINTNER,

recalled as a witness in behalf of the Respondent, being previously duly sworn, testified further as follows:

Direct Examination

By Mr. Ambler:

Q. Mr. Lintner, in Respondent's Exhibit A-9 there is a statement made, which was testified to by the witness, that in the supplemental agreements of May 19, 1941, the rate of bonus to the Libelants in this case was \$60 a month, and also there was a

(Testimony of A. R. Lintner.)

provision for \$2,000 war risk insurance. Was the amount of that war risk insurance subsequently raised in the case of the crew members of the *Capillo*?

A. Yes, it was raised from \$2,000 to \$5,000 per person.

Q. Do you recall when that was done?

A. It was done on November 5, 1941.

Q. The vessel was at sea at that time, was it?

A. Yes. The vessel had sailed on October 17.

Q. Will you state whether or not that increase in the war risk insurance on the lives of the members of the crew of the vessel was made by reason of the provision contained in the October agreements covering war risk and other matters between the Pacific American Ship Owners, acting on behalf of the American Mail Line, and the six Maritime Unions?

A. Yes, it was.

Mr. Ambler: That is all.

The Court: May I ask, did any one of these Libelants thereafter accept any of the benefits of that increase?

The Witness: It was only applicable in case of death or injury.

The Court: So that there was no occasion for it being made applicable to these Libelants who are the parties suing in this case?

Mr. Ambler: Not this life insurance, no, your Honor.

The Court: All right.

Mr. Ambler: That is all, Mr. Lintner.

(Testimony of A. R. Lintner.)

Mr. Levinson: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Ambler: There are two depositions in this case, your Honor, and at this time I would like to read the deposition of Mr. Wililam G. Mullins, taken in New York on November 3, 1944.

The Court: You may do that.

Mr. Ambler: May I use the original deposition for the witness, and then I will propound the interrogatories. Mr. Lintner, would you be kind enough to read the answers on this and I will read the questions.

Your Honor, this is the deposition of Mr. William G. Mullins, taken in New York on November 3, 1944, upon the stipulation; the Libelants being represented by Mr. Cantor of Counsel for the Libelants, and the Respondent being represented by myself. After the witness was sworn, the following questions were propounded and answers made.

(Whereupon, the Mullins deposition was read from page 3, line 7, to page 5, line 9, inclusive.)

Mr. Levinson: Counsel, may I ask a preliminary question. Does the American Merchant Marine Institute represent the American Mail Line?

Mr. Ambler: The American Mail Line is not a member of the American Merchant Marine Institute.

Mr. Levinson: I do not see the materiality of any of this deposition.

Mr. Ambler: I will tie it up later, your Honor. We can't prove the whole case with the first one or two witnesses.

Mr. Levinson objected to the testimony of the witness, William G. Mullins, on the ground that it is immaterial; that it had nothing to do with the controversy here involved; that the negotiations between American Merchant Marine Institute, Inc., to which American Mail Line, Ltd. did not belong and eastern unions were not material to the issues; that the American Merchant Marine Institute, Inc., only represented some fifty to sixty per cent of the operators. The court reserved ruling on the materiality of the deposition and the materiality and admissibility of Respondent's Exhibits "A" to "F", inclusive, identified in the deposition.

Mr. Levinson objected to the deposition of Mr. J. B. Bryan on the ground that it is not material and relates to facts which have no bearing on the issues before the court. The court reserved ruling on the depositions of Mr. J. B. Bryan and on the Respondent's Exhibits A, G, H, I and J identified therein. At the conclusion of the reading of the depositions, the court overruled libelants' objections and received both depositions as part of respondent's case.

District Court of the United States for the Western
District of Washington, Northern Division

Ad. 14,625

EDWARD J. STEEVES, HUGO CALGAN,
WILLIAM A. PORTER and SAMUEL S.
TAYLOR,

Libelants,

against

AMERICAN MAIL LINE, LTD., a corporation,
Respondent.

Deposition of William G. Mullins, a witness
called on behalf of the Respondent, at the offices of
Messrs. Tompkins, Boal & Tompkins, 116 John
Street, New York City, on November 3, 1944.

Appearances:

Messrs. Grosscup, Morrow & Ambler
(Mr. Ambler) for Respondent.

Richard M. Cantor, Esq.,
for Libelants.

WILLIAM G. MULLINS,

being duly sworn and examined as a witness on be-
half of the respondent, in accordance with the re-
quirements of Rule XLIV of the United States
District Court promulgated on April 29, 1943, tes-
tified as follows:

Direct Examination

By Mr. Ambler:

Q. Where do you reside?

(Deposition of William G. Mullins.)

A. 268—67th Street, Brooklyn.

Q. How long have you resided in the State of New York? A. About 25 years.

Q. Do you expect to continue to reside in this State? A. Yes.

Q. What is your present occupation?

A. I am the Director of the Labor Relations Bureau of the American Merchant Marine Institute, Inc.

Q. How long have you been employed by the American Merchant Marine Institute?

A. About 12 years.

Q. Have you at all times been doing the same type of work?

A. Not for the whole of that time; for the past five years I have been doing labor relations work as director of the bureau exclusively—since 1938.

Q. Since 1938 you have been doing exclusively labor relations work? A. Yes.

Q. What is the American Merchant Marine Institute?

A. A trade association composed of American steamship companies.

Q. Engaged in offshore trade?

A. Offshore and coastwise and intercoastal and foreign trade aboard seagoing merchant ships.

Q. In 1941 can you give me approximately what proportion in number of the companies so engaged on the Atlantic coast were members of your association?

A. In number of companies we had between 50%

(Deposition of William G. Mullins.)

and 60%; in tonnage owned or operated by American flag companies we had 75%.

Q. Those companies as you say were engaged in coastwise and foreign trade?

A. Yes, that is correct.

Q. Since 1938, in your position as director of the labor relations bureau, have you had custody of the records of the association as far as labor matters were concerned? A. I have had.

Q. Just what is the function of the American Merchant Marine Institute in labor matters for its members; what does it do?

A. The Institute has negotiated with unions representing the employees of American flag steamship companies—seagoing employees—and has negotiated with them collective bargaining agreements in behalf of the companies, covering wages and working conditions and including agreements covering war bonuses.

Q. You are familiar with all of the negotiations in labor matters carried on by the Institute on behalf of its various members since 1938?

A. I am.

Q. With what maritime unions did you make contracts during the period since 1938?

A. The Institute has negotiated contracts for various of its member companies since 1938 with some eight or nine unions; I can name them if necessary.

Q. With what unions did you negotiate in 1941?

(Deposition of William G. Mullins.)

A. With the National Organization of Masters, Mates and Pilots of America, the National Marine Engineers Beneficial Association, the National Maritime Union of America, the American Communications Association, CIO, the Commercial Telegraphers' Union.

Q. Those last two unions comprise the radio operators?

A. That is correct. There may have been other unions that I don't recall at the moment.

Q. Have you ever negotiated any contracts with the Sailors' Union of the Pacific?

A. We have not.

Q. Have you ever negotiated any contracts with the Seafarers International Union?

A. There were negotiations in behalf of one of our member companies with the Seafarers International Union; my recollection however is that it did not terminate in an agreement.

Q. The Masters, Mates and Pilots and the Engineers' Union, the NMEBU, the second union you mentioned, have a membership on both the Atlantic and Pacific Coast, do they not?

A. They do.

Q. You were at that time negotiating primarily with those unions for the Atlantic Coast operation, were you not?

A. The negotiations with the National Organization of Masters, Mates and Pilots and the National Marine Engineers Beneficial Association in particular were carried on in behalf of individual

(Deposition of William G. Mullins.)

steamship companies, members of the Institute. These agreements when completed were signed in most cases by the union's business agent or representative in the particular port in which the agreement was negotiated. These locals or representatives were on the Atlantic and Gulf coasts; none on agreements covering operations on the Pacific coast; however, it is not entirely correct to say that every one of the agreements applied uniformly to the Atlantic and Gulf coasts.

Q. Some of the vessels you mean went into the Pacific with the crews aboard and of course that covered the operations during that period?

A. That is correct.

Q. During the year 1941 and for some time prior to that, how was the compensation of offshore personnel divided?

A. From early in 1940 the compensation of sea-going personnel has consisted of basic wages and temporary emergency increase, sometimes called a temporary emergency wage, and war bonuses, the last named being in varying amounts from time to time.

Q. Were those three types of compensation covered generally by the same contract or were they covered by addenda or by supplements or what was the mechanics?

A. The three types of compensation were first contained in collective bargaining agreements to which addenda or supplements were added, providing for certain amounts of temporary emergency

(Deposition of William G. Mullins.)

compensation and war bonuses; as time went on and contracts were renewed, all three conditions were incorporated within the collective bargaining agreements.

Q. In July, 1941, were you familiar with any negotiations which were conducted in respect to bonuses for offshore employees?

A. In July, 1941, the conference was called at the request of Rear Admiral Emory S. Land, Administrator of the War Shipping Administration—I am not sure whether his title at that time was Administrator of the War Shipping Administration or Chairman of the Maritime Commission—but at any rate he called the conference under the auspices of the Maritime Commission and the United States Department of Labor with representatives of the unions representing licensed seagoing personnel and the representatives of the steamship companies in Washington.

Q. Did that cover any particular union, that first conference?

A. No; the invitation or request for the meeting was transmitted to all licensed personnel unions.

Q. Was that on the Atlantic and Pacific coast, both? A. Yes.

Q. Were there any employer groups or individual employers invited to that meeting?

A. The American Merchant Marine Institute was invited, the Pacific American Shipowners' Association was invited and invitations were sent I understand to a number of individual steamship

(Deposition of William G. Mullins.)

companies who were not members of either of these associations.

Q. As a result of this invitation was there a meeting held of these particular groups?

A. A meeting was held in Washington in August, the exact dates of which I can't remember—the middle or second week of August.

Q. You may refresh your recollection as to the date from your records.

A. August 12, 1941.

Q. As a result of those meetings in August, 1941, was any agreement reached between the employers and any seagoing unions?

A. An agreement was reached as a result of that conference and was signed by the representatives of the licensed officers' unions present and by the representatives of the steamship company; also it was signed by the War Shipping Administration and the Department of Labor representative, if I am not mistaken.

Q. Do you have there the original of that agreement to which you refer?

A. Yes, I do have it.

Q. Prior to those meetings were there any demands served by the Masters, Mates and Pilots and the National Marine Engineers Beneficial Association? A. There were.

Mr. Ambler: I ask to have this agreement marked for identification.

(Agreement marked Respondent's Exhibit A for Identification.)

(Deposition of William G. Mullins.)

Q. You are familiar with the demands served by those two unions at that time? A. Yes.

Q. Handing you Respondent's Exhibit A for Identification, will you state whether or not that is a true copy of the demands which were served at the time of that meeting?

A. I have a copy of that and that is a true copy.

Q. Coming to the contract which was subsequently signed, will you give me the date of the contract signed after these proposals had been made and negotiations were had?

A. The agreement signed by the representatives of the licensed officers' unions, the steamship companies, Department of Labor and the Maritime Commission is dated August 16, 1941.

Q. Do you have the original there?

A. Yes, I have.

Mr. Ambler: I ask to have this agreement marked for identification.

(Agreement dated August 16, 1941, marked Respondent's Exhibit B for Identification.)

Q. Handing you Respondent's Exhibit B for Identification, will you examine that and tell me if that is a true copy of the original which is in your files, and will you also check the one or two documents attached to that; will you check these to see that they are also correct?

A. The copy of the agreement dated August 16, 1941, appears to be a true copy of the original which I have in my file. Attached to it is a letter signed

(Deposition of William G. Mullins.)

“E. S. Land, Chairman, United States Maritime Commission” addressed to Mr. Frank J. Taylor, President, American Merchant Marine Institute.

Q. That was the letter you referred to a while ago as having been the letter calling this conference?

A. Calling a conference for August 12th.

Q. That is dated July 22, 1941?

A. Yes, the original of which I have in my files. There is also attached to this agreement a form of letter sent to individual steamship companies by Admiral Land advising them of the conference and asking them to attend. Also attached is a copy of the opening remarks by Commissioner McCauley at the conference on August 12, 1941.

Q. That last document is merely a copy from the transcript of that hearing?

A. That is correct.

Q. You have a transcript of that hearing?

A. I have a transcript of the hearing.

Q. Subsequent to the signing of this contract did your Association communicate the results of that conference to your membership?

A. We did, in a circular letter dated August 18, 1941.

Mr. Ambler: I might say for the record that the matter which appears on what I am going to have now identified as Exhibit C for Identification, which is in pencil and ink has no significance whatsoever. It is the contents only I am interested in.

(Deposition of William G. Mullins.)

(Circular letter marked Respondent's Exhibit C for Identification.)

Q. Handing you Respondent's Exhibit C for Identification, will you state whether or not that is a true and correct copy of the circular you sent out under date of August 18, 1941 to your membership?

A. It is a correct copy of that circular.

Q. Referring you to that circular, the last paragraph reads as follows: "Conferences will continue tomorrow, August 19th, for the unlicensed personnel at which time the committee of the institute will be represented in behalf of its members. The conferences for the staff officers and radio operators originally scheduled for August 15th have been postponed until August 26, 1941." Did the conferences which are there mentioned for labor organizations continue?

A. The conference with the representatives of the unlicensed seagoing personnel was held on August 19th. I don't know that any conference was held with representatives of the staff officers or radio operators.

Q. But there were conferences with the representatives of the unlicensed personnel?

A. That is correct.

Q. Did those conferences result in any contract between any of the members of your association and those unions?

A. No, the conference of August 19th resulted in no agreement.

(Deposition of William G. Mullins.)

Q. Were there any subsequent negotiations or was an agreement later reached with any of the unions representing offshore unlicensed personnel?

A. At the conference of August 19th the representatives of the Seafarers' International Union expressed themselves as dissatisfied with the kind of agreement that had been worked out for the licensed officers and expressed themselves as preferring to negotiate separately with the companies with whom they had collective bargaining agreements. Following that conference of August 19th the Seafarers' International Union did negotiate with several of the companies and the Institute acted as the representative for the companies.

Q. Was there another invitation issued by Admiral Land on or about that time in connection with the unions?

A. On September 22nd Admiral Land telegraphed Mr. F. A. Taylor, President of the Institute, as follows: "Maritime Commission views with concern and anxiety the danger to shipping so vitally needed for national defense and all out aid to the democracies unless some method and procedure are immediately found and resorted to which will remove future sources of contention between all elements of the industry and which will stabilize and to a greater extent than now prevails standardize bonuses on our various trade routes. Believing that the solution of these problems rests primarily in the hands of representatives of operators and representatives of personnel and that these

(Deposition of William G. Mullins.)

objectives can be secured through a joint meeting, the Maritime Commission will if requested by these representatives call such a meeting. We therefore offer the facilities of the Maritime Commission for purposes of holding conferences between the Seafarers' International Union, National Maritime Union, Sailors' Union of Pacific, Marine Cooks & Stewards of Pacific and Marine Firemen, Oilers, Water Tenders and Wipers Association of Pacific representing unlicensed personnel of vessels operated by companies who have collective bargaining agreements with those unions and the American Merchant Marine Institute, also the Pacific American Shipowners Association representing the owners, also other owners not members of those associations so that agreement can be reached between the owners and the unlicensed personnel with respect to war bonuses and war risk areas. Will be glad to make our facilities available for meeting in Washington Thursday this week. The Maritime Commission urges immediate return to work and sailing of vessels. Will appreciate your telegraphic reply. E. S. Land, U. S. Maritime Commission."

Q. Subsequent to that, was there any agreement reached between employers and unlicensed personnel?

A. No, shortly after receipt of that telegram the dispute between Seafarers International Union and the companies with which it was negotiating was certified to the National Defense Mediation Board.

(Deposition of William G. Mullins.)

Q. As a result of that action, what took place, if anything?

A. As a result of the proceeding before the National Defense Mediation Board a decision was handed down under Case No. 80.

Q. Who was on that board of the National Defense Mediation Board?

A. The board was composed of Charles E. Wyzanski, Jr., who represented the public; George H. Mead, who represented employers, and Robert J. Watt, representing employees.

Q. Do you have a copy of that decision there?

A. I have a copy of the decision.

Mr. Ambler: I ask to have this paper marked for identification.

(Copy of decision of National Defense Mediation Board marked Respondent's Exhibit D for Identification.)

Q. Handing you Respondent's Exhibit D, will you state whether or not that is a true copy of the decision of the board to which you have just referred?

A. It appears to be a correct copy down to and including the signatures of the members of the National Defense Mediation Board; however, in the original copy in my file there is added the following: "The representatives of the shipowners agree to urge those they represent to accept these recommendations" following which statement are the signatures of five representatives of the steamship companies.

(Deposition of William G. Mullins.)

Q. Are there any other matters on your original?

A. Following the decision also there is the following: "The representatives of the Sailors Union of the Pacific agree to urge those they represent to accept these recommendations" and the signature of two of their representatives; also the following "The representatives of the Seafarers International Union of North America, Atlantic and Gulf District, though not fully in accord with the recommendations, agree to carry back these recommendations to the union membership and to explain to the membership the circumstances as to why it is to the union's interest to accept these recommendations and explain to them their responsibility in connection with these recommendations" following which statement are the signatures of four representatives of the Seafarers International Union.

Q. Following these recommendations of this board were they subsequently accepted by the parties to the hearing?

A. Following the recommendations of the National Defense Mediation Board, an agreement was entered into by many of the steamship companies, members of the Institute, and the National Maritime Union of America——

Q. Before we come to that, were the recommendations of this board accepted by the parties?

A. To the best of my knowledge they were in the sense they were adverted to and made effective on the ships of the company.

(Deposition of William G. Mullins.)

Q. By both the unions and the employers, parties to this agreement? A. Yes.

Q. Subsequent to Case No. 80, did your Institute on behalf of its members or any of them conduct any negotiations with the National Maritime Union looking to a contract?

A. Commencing in September, 1941, the Institute in behalf of some 23 or 24 of its member companies was in negotiation with the National Maritime Union for renewal of the current collective bargaining agreement.

Q. Did that have to do with basic wages or emergency increases or war bonuses or all three?

A. The collective bargaining agreement included provision for basic wages and temporary emergency compensation; it also contained a clause under which negotiations could be undertaken for a war bonus—for payment of a war bonus—on completion of the new agreement which took place on October 31, 1941.

Q. This is the date of the agreement between the Institute on behalf of its members and the NMU covering basic wages and emergency increases?

A. Yes.

Q. That was dated October 31, 1941?

A. Yes.

Q. Did you at or about that time conclude on behalf of your members an agreement covering war bonus?

A. We did, on November 6, 1941, complete a

(Deposition of William G. Mullins.)

supplementary agreement with the National Maritime Union of America which provided for payment of war bonuses and certain other war risk benefits to the seamen.

Q. Was that a standard form of contract which was negotiated between your institute on behalf of its members and the union?

A. It was a standard form of contract signed by all the member companies of the institute which had recognized the NMU as the agent for collective bargaining for their unlicensed personnel.

Mr. Ambler: I ask to have this document marked for identification.

(Form of supplementary agreement dated November 6, 1941, marked Respondent's Exhibit E for Identification).

Q. Handing you Respondent's Exhibit E for Identification which purports to be a form of supplementary agreement between National Maritime Union and an employer dated November 6, 1941, will you state whether or not that is a true and correct copy of the form of contract which was negotiated to be signed by your member companies and the NMU?

A. It is a correct copy.

Q. And those contracts were signed, were they, between your member companies who recognized the NMU as agent of their employees for collective bargaining in the unlicensed department?

A. They were.

Q. Was there a supplemental agreement nego-

(Deposition of William G. Mullins.)

tiated between your association and its member companies and the NMU covering the same subject of war bonuses, particularly with regard to the Rusisan trade, shortly after November 6th?

A. There was a supplementary agreement, No. 2, negotiated on December 2, 1941, providing especially for bonuses on voyages to Russia.

Mr. Ambler: I ask to have this supplementary agreement marked for identification.

(Supplementary agreement marked Respondent's Exhibit F for Identification).

Q. Handing you Respondents' Exhibit F for Identification, is that a true and correct copy of the contract to which you have just referred?

A. Yes, it is.

Q. Were the agreements dated October 6th and December 2, 1941, between your members and the NMU covering war bonuses the agreements which were in effect between those parties up until the beginning of the war on December 7, 1941?

A. They were.

Q. And they remained in effect, did they, until the establishment of the first Maritime War Emergency Board?

A. They did.

Q. Referring to Respondent's Exhibit B for Identification, which is the contract executed between your association, the Pacific American Steamship Owners Association and the National Association of Masters, Mates and Pilots of America and the National Marine Engineers Bene-

(Deposition of William G. Mullins.)

ficial Association, dated August 16, 1941, did that contract remain unchanged between the parties between the time of its execution and the commencement of the war on December 7, 1941, and the subsequent formation of the Maritime War Emergency Board?

A. No, it was changed in respect to the percentage of war bonus to be paid; as originally signed, the agreement provided 60% of basic wages for certain voyages and 25% for others.

Q. Could you tell me approximately when that change was made from 60% which is provided for in Respondent's Exhibit B for Identification and the amount which was later agreed upon?

A. These rates were changed from 60% to 66 2/3% of basic wages and from 25% to 27 1/2% of basic wages.

Q. Under what date was that?

A. Under date of October 21, 1941, by grant of the United States Maritime Commission, pursuant to a provision of the August 16th agreement whereby the Department of Labor and the Maritime Commisison undertook jointly to examine all facts pertaining to the agreement at the expiration of 30 days from the date thereof and if it were found that inequalities existed detrimental to the licensed officers, that those joint recommendations would be made by the Department of Labor and the Maritime Commission for the correction of such inequalities.

(Deposition of William G. Mullins.)

Q. You mean if any inequalities resulted as a result of contracts with the unlicensed personnel which might adversely affect the licensed officers?

A. Inequalities as compared to other groups employed on the vessel.

Q. What was the date the Commission reported there were inequalities?

A. On October 21, 1941 the Commission found that as a result of the recommendations of the National Defense Mediation Board in Case No. 8, whereby the war bonus for unlicensed seagoing personnel was fixed at \$80 per month, that proportionate changes should be made in the licensed officers' agreement.

Q. And except for the increases in the percentage that you have described, the contract of August 16, 1941 (Respondent's Exhibit B for Identification) remained unchanged until the creation of the War Emergency Board? A. It did.

Q. Did your association have any negotiations with the radio operators during this period or say August until December, 1941?

A. During the period August to December, 1941, the institute was in negotiation with the American Communications Association in behalf of a group of its member companies looking toward the completion of a collective bargaining agreement covering wages and working conditions.

Q. Did you ever arrive at a contract with the radio operators prior to the commencement of the war on December 7, 1941? A. We did not.

(Deposition of William G. Mullins.)

Q. What subsequently happened as far as your negotiations with them were concerned?

A. Following the inability of the companies and the unions to agree, the dispute was referred to an arbitrator named by the United States Department of Labor; the arbitration award was handed down in February, 1942.

Q. And was there then a contract made between your institute on behalf of its members and the American Communications Association?

A. Following the arbitrator's award an agreement was executed by member companies of the institute and the American Communications Association.

Q. That adopted the decisions of the War Emergency Board, did it not?

A. At the same time that this collective bargaining agreement was executed a supplementary agreement was signed covering war bonuses in which more of the provisions of the first decision of the Maritime War Emergency Board were incorporated.

Q. The contracts of August 16, 1941 between your association and the Masters, Mates and Pilots and the licensed engineers cover the field as far as your negotiations on behalf of your members from August, 1941 to December, 1941, as far as licensed personnel is concerned, do they not?

A. That covered substantially all of the negotiations; there may have been negotiations in behalf of individual steamship companies covering some phase

(Deposition of William G. Mullins.)

of their collective bargaining relationships with these unions.

Q. As far as war bonus is concerned, is that true?

A. That is correct as far as war bonus is concerned.

Q. As far as all unlicensed personnel which would include not only sailors but firemen, oilers, water tenders, waiters, cooks, messmen,—they are all represented as I understand on the Atlantic Coast by the NMU?

A. The unlicensed personnel represented by the NMU include members of the deck, engine and steward's department, sailors, firemen, oilers and messmen and other steward's department ratings. However, the representation of the NMU is not complete for the whole unlicensed personnel, because the Seafarers International Union represents members of the deck department.

Q. Did your association have any contracts with the Seafarers International Union covering bonus during the period from August, 1941 to December, 1941 other than this case 80?

A. We had no agreement with Seafarers International Union covering war bonus in the fall of 1941.

Q. Referring you to Respondent's Exhibit B for Identification and Respondent's Exhibit E for Identification and Respondent's Exhibit F for Identification, did these three contracts have any specific

(Deposition of William G. Mullins.)

provision with regard to the rights of the parties in case of internment of the crew?

A. All three agreements contain provision pertaining to the internment of the crew.

Q. And are those payments provided by the three contracts the same?

A. Yes, essentially the same.

Q. They provide, do they not, that during the period of internment the employee is to receive basic wages plus emergency increase?

A. That is correct.

Q. Was that same method of compensation in the case of internment true prior to August, 1941, or had there been any change at or about that time?

A. Prior to 1941, the clause with respect to internment of crew varied in different contracts.

Q. Some contracts provided I think for payment of bonuses during internment?

A. That is correct.

Q. And some didn't?

A. That is also correct.

Q. It wasn't until the fall of 1941 that this was standardized, as far as the Atlantic and Gulf were concerned, by those contracts which you have before you?

A. Commencing in August, 1941, for the licensed, and in November and December, 1941, for the unlicensed personnel.

Q. Your association as you testified does not comprise the entire shipping industry; can you state whether or not from your familiarity with the

(Deposition of William G. Mullins.)

various negotiations on labor agreements, your association has set the pattern on the Atlantic and Pacific Coast, generally speaking for labor agreements since August, 1941?

Mr. Cantor: I object to that as covering a great deal of territory.

A. Generally speaking, that is correct.

Q. Referring to Respondent's Exhibit E for Identification, will you tell me when that became effective?

A. It became effective on October 1, 1941, on ships, whether at sea or in port.

Q. My attention has been called to an article entitled Series No. R-1614, from the Monthly Labor Review of January, 1944, entitled "War Risk Bonuses for Seafaring Personnel." On page 3 of this article there is this paragraph: "Thus an agreement of National Maritime Union with the company members of the American Merchant Marine Institute effective October 1, 1941, sanctioned a port bonus of \$100 for the localities within the Suez Canal and added a special bonus of five dollars per day for each additional day beyond five spent in Suez Canal ports. In the event of the loss of a vessel as a result of hostilities, provision was made for the payment of full wages, bonus, and travel cost by the company up to and including the day of arrival at a continental United States port. Emphasizing particularly the word "bonus" in the sentence I have just read, did your institute have any agreement such as that mentioned in this article provid-

(Deposition of William G. Mullins.)

ing for payment of bonus under those circumstances?

A. I know of no such agreement providing for payment of bonuses during internment of crew as described in that sentence.

Q. Are the other matters mentioned in there, the port bonus for localities within the Suez Canal, are they mentioned in Respondent's Exhibit E for Identification?

A. The sentence you read appears to refer to the supplementary agreement between member companies of the National Maritime Union, made on November 6, 1941, Exhibit E, which became effective on October 1, 1941, and which contains provisions for the payment of a port bonus of \$100 for entering the Suez Canal, and an additional bonus of \$5 per day for each day spent at Suez beyond five days.

Q. The compensation provided by that contract in the event of loss of the vessel and internment of the crew is for payment of full wages and emergency increase only; is it not?

A. That is correct.

Q. Has there been sometimes a confusion between the term "bonus" and "emergency increase?"

A. Occasionally there has been confusion as to the meaning of the term "emergency wages" or "bonus;" people have sometimes thought "emergency wage" referred to "war bonus."

Q. That situation however was pretty well clari-

(Deposition of William G. Mullins.)

fied by the fall of 1941; was it not, the distinction between the two? A. I would say so.

Cross Examination

By Mr. Cantor:

Q. Where was that clarification made and by whom?

A. The distinction between a temporary emergency award and a war bonus has been to my mind clearly stated in agreements that have been made 1940; however, people who have not been familiar with these agreements have at times been confused when they read one term.

Q. You stated categorically that that confusion, if it be confusion, was clarified by the fall of 1941; I would like to know in what manner it was clarified and by whom and through whom?

A. The meaning of the term "temporary emergency compensation" and the meaning of the term "war bonus" was cleared in the agreements that were negotiated for the period prior to our entry into the war in December, 1941, and generally speaking there was no confusion.

Q. What is your definition of the term "emergency wages?"

A. "Emergency award" and "emergency wage" as it has been used in the contracts negotiated with the seagoing unions since 1940 has referred to a wage paid for the duration of the war; it was termed an emergency wage because at the time it was first negotiated the United States was not at

(Deposition of William G. Mullins.)

war but there did exist what was called at that time a state of emergency.

Q. Wasn't this emergency wage paid as a bonus for the extra risk that the men were subjected to during that particular period?

A. No. It was paid as a wage increase in consideration of the great activity in shipping that had come about in the period from 1939 on and represented an agreement between the unions and the companies as to the payment of increased wages. It was understood however that the increased activity was due to the war that was going on in Europe, that when the war came to an end the probability is that the increased shipping activity also would come to an end and the increased wage would disappear.

Q. Your definition of emergency wage is a small increase in wages that was given those men because of the general stiffening of the wage rate that was in effect; that is correct?

A. That is correct.

Q. It has no reference to the bonus that was given to them?

A. No, sir.

Q. Have you a contract with you where that definition appears?

A. I do not have a copy of that with me, but the collective bargaining agreement between the NMU and the companies which was made on October 31, 1941, had a provision for the payment of basic wages and temporary emergency wage increase.

Q. By "temporary emergency wage increase"

(Deposition of William G. Mullins.)

you mean a small increase in the rate of wages paid before was called an emergency payment?

A. That is correct.

Q. Will you take a look at the supplemental contract between the National Maritime Union and an unspecified company, as one of the exhibits here, apparently made in December 2, 1941; look at the part that says "Now, therefore, it is agreed that" the emergency compensation to cover war risk hazards to unlicensed personnel of the company's vessels shall be as follows:" Doesn't the rest distinctly refer to bonus for war hazard?

A. Yes.

Q. That called it "emergency compensation?"

A. Yes.

Q. You say that term as employed there has a different connotation from emergency wages as appearing in Paragraph 4 of the same agreement?

A. Yes, it has a different connotation.

Q. Is there any provision here made for the payment of bonus in the event that the vessel is interned, destroyed or abandoned as a result of war operations, according to your interpretation of the term "emergency wage?"

A. No.

Q. Do you mean to contend that it was the intention of the framers of this agreement that no bonus payments were to be made to the men in the event the vessel was destroyed or abandoned as a result of war operations?

A. That is right.

Q. You are serious about that contention?

A. Yes.

(Deposition of William G. Mullins.)

Mr. Ambler: It is agreed that the Respondent's Exhibits A-F inclusive which have been identified by the witness may be attached to the original and forwarded to the clerk of the appropriate court. It is also agreed that the substitution of copies of the exhibits in lieu of originals will not be objected to.

DEPOSITION OF J. B. BRYAN

J. B. BRYAN,

having been duly cautioned and sworn by the Notary Public to speak the truth, the whole truth, and nothing but the truth, depose and saith as follows:

Written Interrogatories Propounded to J. B. Bryan
by Notary Public Frank L. Owen, and Answers
to Written Interrogatories.

1. To the first interrogatory, as follows: State your name, present residence and occupation.

He saith: J. B. Bryan, 3007, 20th Avenue, San Francisco, California, President of Pacific American Shipowners Association.

2. To the second interrogatory, as follows: How long have you been engaged in this occupation?

He saith: Seven years as President, and prior to that time I was Secretary.

3. To the third interrogatory, as follows: Give a list of members of Pacific American Shipowners Association in the fall of 1941.

He saith: They are the following:

Admiral Oriental Line

(Deposition of J. B. Bryan.)

American-Hawaiian Steamship Company

American Mail Line

American President Lines, Ltd.

Alaska Steamship Company

Alaska Transportation Company

Coastwise Lines

W. R. Grace & Company

Luckenbach Gulf Steamship Company

Matson Navigation Company

The Oceanic Steamship Company

McCormick Steamship Company

Northland Transportation Company

Pacific Lighterage Corporation

Pacific Republics Line

Santa Ana Steamship Company

States Steamship Company

Pacific-Atlantic Steamship Company

Sudden and Christenson

Shepard Steamship Company

Weyerhaeuser Steamship Company

Union Sulphur Company.

4. To the fourth interrogatory, as follows: State briefly the nature of the participation of Pacific American Shipowners Association in labor negotiations during the past five years.

He saith: Pacific American Shipowners Association was formed January 23, 1936, and ever since its formation it has acted in labor relations between its members and unions of seafaring employees on the Pacific Coast, negotiating and executing collec-

(Deposition of J. B. Bryan.)

tive bargaining contracts on behalf of its members and attending to matters relating to their performance. For some years it has had contracts with six maritime unions operating on the Pacific Coast. Two of these are affiliated with the American Federation of Labor, three of them with the CIO and the remaining union is affiliated with neither. Since the middle of 1937 the Association has been able to successfully negotiate contracts with these unions relating to wages and working conditions. Commencing in the fall of 1939 collective bargaining agreements made by the Association on behalf of its members contained a provision for special settlement of bonuses on voyages in war zones. Previous to this time the Association had not negotiated for its members on the subject of war bonus. At first individual companies directly concerned settled the question and amount of war bonuses. This, however, led to inequities and confusion, so in 1940 the Association undertook to establish general standards through general agreements with each union on a uniform basis applicable to all ships entering defined war zones. These agreements, originally made in 1940, remained in effect until February, 1941, when certain adjustments and changes were made. Some additional changes were made in some agreements in May, 1941. At this time there was particularly keen rivalry between Pacific and Atlantic unions on the negotiation of bonus agreements. Their settlement had proved temporary and serious work stoppages had resulted. To remedy

(Deposition of J. B. Bryan.)

this instability in the bonus rates, the United States Maritime Commission and the Department of Labor called conferences of Atlantic and Pacific shipowners and unions in July and August, 1941, which resulted in a contract dated August 16, 1941, between the American Merchant Marine Institute, Inc., and Pacific American Shipowners Association, on the one hand, and the two unions representing licensed personnel, on the other hand.

5. To the fifth interrogatory, as follows: Give the names of the Maritime Unions with which your Association has been primarily engaged in negotiations during the last five (5) years.

He saith: National Association of Masters, Mates and Pilots of America, West Coast Local No. 90;

National Marine Engineers' Beneficial Association of America; American Communications Association (Marine Division);

Sailors' Union of the Pacific;

Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association;

Marine Cooks and Stewards Association of the Pacific Coast.

6. To the sixth interrogatory, as follows:

(a) State whether or not you participated in the negotiations and conferences which ultimately resulted in a contract dated August 16, 1941, between National Organization of Masters, Mates and Pilots of America, National Marine Engineers' Beneficial Association, United Licensed Officers Association

(Deposition of J. B. Bryan.)

and American Merchant Marine Institute, Inc., and Pacific American Shipowners Association.

He saith: Yes.

(b) State briefly the subject matter of these negotiations and conferences and reasons for same.

He saith: As stated in my answer to Question 5, the negotiations and conferences in July and August, 1941, with the Masters, Mates and Pilots and licensed Engineers had to do not with general working conditions, but with war bonus benefits in the case of war risks.

7. To the seventh interrogatory, as follows:

(a) In the negotiations and conferences terminating in this contract of August 16, 1941, were any written demands made by the above two labor organizations?

He saith: Yes.

(b) If your answer to the foregoing is "yes," please attach and identify copy of same.

He saith: Respondent's Exhibit A, attached to this deposition, has been previously identified under the same identifying letter in the deposition of William G. Mullins taken in New York City November 3rd, 1944.

8. To the eighth interrogatory, as follows:

(a) In the negotiations and conferences terminating in this contract were there any written counter-proposals made by Pacific American Shipowners Association and American Merchant Marine Institute, Inc.?

He saith: Yes.

(Deposition of J. B. Bryan.)

(b) If your answer to the foregoing is "yes", please identify and attach copy of same.

He saith: Attached and marked Respondent's Exhibit G is a true, full and complete copy of the written counter-proposals made by Pacific American Shipowners Association and American Merchant Marine Institute, Inc., to the demands of the Masters, Mates and Pilots and Engineers during negotiations and conferences held in New York in July and August, 1941; which negotiations and conferences resulted in a contract of August 16, 1941; copy attached, marked Exhibit B. This was previously identified under that identifying letter in the deposition of William G. Mullins, taken in New York, November 3, 1944.

9. To the ninth interrogatory, as follows: Was any agreement reached between Pacific American Shipowners Association and the Radio Operators and the three Unions representing the unlicensed personnel at or about this time?

He saith: Some meetings were held but no agreement was reached with any of the four unions mentioned.

10. To the tenth interrogatory, as follows:

(a) At or about this time were any written demands made upon the Pacific American Shipowners Association by any of the Unions representing the Radio Operators or any of the Unions representing unlicensed personnel?

He saith: Yes.

(Deposition of J. B. Bryan.)

(b) If your answer to the foregoing is "yes", please identify and attach copy of same.

He saith: Attached to and made a part hereof, and marked Respondent's Exhibit H, is a full, true and complete copy of demands dated September 15, 1941, made upon the members of the Pacific American Shipowners Association by the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association. As in the case of the conferences and negotiations in July and August, 1941, with the licensed personnel these demands had to do primarily with war bonus and compensation for war risk.

Attached to and made a part hereof, marked Respondent's Exhibit I, is a true, full and complete copy of the demands made upon the members of the Pacific American Shipowners Association by the Sailors' Union of the Pacific dated September 16, 1941. As in the case of the demands of the Marine Firemen these demands have to do primarily with war bonus and compensation for war risks.

My files do not show any written demands made upon the Association or its members by the Radio Operators or the Cooks and Stewards Union at this time. It is my recollection that the latter two unions were merely waiting to see the results of current negotiations by other unions.

11. To the eleventh interrogatory, as follows: Please describe briefly what further action was taken to effect an agreement between your organi-

(Deposition of J. B. Bryan.)

zation and the Radio Operators and the unlicensed personnel.

He saith: The Association and the Radio Operators and the unlicensed personnel were unable to effect an agreement and the same situation existed on the Atlantic Coast between the American Merchant Marine Institute, Inc., and the unlicensed personnel operating on the Atlantic Coast. In September, 1941, there were many serious stoppages of work. At length in the latter part of September and early October the American Merchant Marine Institute, Inc., Pacific American Shipowners Association and Waterman Steamship Corporation and the Seafarers International Union of North America and the Sailors' Union of the Pacific were parties to a Case No. 80 before the National Defense Mediation Board covering the general subject matter of war bonus and war risk compensation.

12. To the twelfth interrogatory, as follows:

(a) Did you participate in the hearings in late September and early October, 1941, in Case No. 80 before the National Defense Mediation Board?

He saith: Yes.

(b) If your answer to the foregoing is in the affirmative, please describe briefly the facts leading up to the hearing and attach and identify a copy of any written recommendations of the Board.

He saith: See my answer to Question 11 above. Attached hereto, marked Respondent's Exhibit D, is a true copy of the recommendations of the Board

(Deposition of J. B. Bryan.)

of the National Defense Mediation Board in Case No. 80. This decision which is undated was rendered and distributed about October 6, 1941. It is identified by the same letter in the deposition of Mr. Mullins previously mentioned.

13. To the thirteenth interrogatory, as follows:

(a) State whether or not contracts covering war bonus and other war risk compensation were subsequently effected between your Association and the Radio Operators and the unlicensed personnel.

He saith: Yes.

(b) If your answer to the foregoing is "yes", please give the dates of the contracts so effected.

He saith: Supplementary agreement with National Association of Masters, Mates and Pilots of America, West Coast Local No. 90, October 10, 1941.

Supplementary agreement with Marine Engineers' Beneficial Association October 15, 1941.

Supplementary agreement with American Communications Association (Marine Division) October 16, 1941.

Supplementary agreement with Sailors' Union of the Pacific, October 9, 1941.

Supplementary agreement with Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, October 9, 1941.

Supplementary agreement with Marine Cooks and Stewards Association of the Pacific Coast, October 10, 1941.

(Deposition of J. B. Bryan.)

14. To the fourteenth interrogatory, as follows:

(a) State whether or not the contract of August 16, 1941, between your Association and the Masters, Mates and Pilots and the National Marine Engineers' Beneficial Association was in any way modified or amended at or about this time.

He saith: Yes.

(b) If so, give the dates of the contracts making this change and if you know, state the reason therefor.

He saith: In the agreement of the Association with the Masters, Mates and Pilots and licensed engineers, dated August 16, 1941, it is provided that the Department of Labor and the United States Maritime Commission jointly will determine whether inequities exist detrimental to licensed officers who had signed this early contract concerning the war bonus and war risk compensation. As a result of a communication from the Government finding inequities detrimental to licensed officers the percentage of bonus on the Pacific Coast in the various areas mentioned in Respondent's Exhibit B was raised from sixty per cent in the first five areas to 66 2/3 per cent in those areas.

15. To the fifteenth interrogatory, as follows:

State whether or not there was any written or oral communication between your association and the American Merchant Marine Institute, Inc., concerning the language of any clause in the contract between your Association and the above Unions

(Deposition of J. B. Bryan.)

pertaining to compensation during any possible period of detention by the enemy.

He saith: There is no written communication between the Associations nor do I recall any oral discussion between the two Associations on this subject.

16. To the sixteenth interrogatory, as follows:

(a) Subsequent to the execution of the six contracts between your Association and the Unions representing licensed personnel, Radio Operators and unlicensed personnel, has there been any written or oral communication between either your Association or the American Merchant Marine Institute, Inc., and any of the six Pacific Coast Maritime Unions concerning any possible difference in the language of your contracts concerning compensation during internment made in the fall of 1941 and similar contracts of American Merchant Marine Institute, Inc., made about the same time?

He saith: Yes.

(b) If your answer to the foregoing is "yes", please identify and attach copies of same.

He saith: I attach hereto marked Exhibit J a full, true and complete copy of a letter dated October 24, 1941, addressed by the President of the National Marine Engineers' Beneficial Association to the President of the American Merchant Marine Institute, Inc., on this subject. This is the only written communication which I have found on the subject and I have no recollection of ever having seen or heard of any answer to the same. I have

(Deposition of J. B. Bryan.)

no recollection of any oral communications on the subject.

17. To the seventeenth interrogatory, as follows:

(a) Has there been at any time to your knowledge any correspondence, protest, or other communication from your Association or the American Merchant Marine Institute, Inc., or any of the six Pacific Coast Maritime Unions to the Maritime War Emergency Board protesting or criticizing the action of the Board in adopting the rule laid down in Article 6 of Decision No. 5, Revised, of Maritime War Emergency Board, dated February 21, 1942, limiting the period of the payment of war bonus?

He saith: I know of none.

(b) If your answer to the foregoing is "yes", please identify and attach copies of same.

He saith: See my answer to Question 17 (a).

Mr. Ambler: Respondent rests.

Mr. Levinson: In all fairness to Respondent, I must say that your Honor has still reserved ruling on the various exhibits.

Mr. Ambler: At this time I have already moved the admission in evidence, and if the record does not so show, I at this time move the admission in evidence of Respondents' Exhibits A to K inclusive and A-1 to A-13 inclusive.

The Court: I would like to take them up separately. I would like to see K again. I would like

to have you state why you are entitled to have it received.

(Argument.)

The Court: You may proceed, and if there is nothing else to be said, I think I am ready to rule upon Respondent's Exhibit K. The objections to that are overruled, and that exhibit is now admitted.

(Whereupon, Respondent's Exhibit K for identification was admitted in evidence.)

RESPONDENT'S EXHIBIT "K"

Admitted Apr 6 1945.

(Adopted at the Conference of Representatives of Steamship Companies and Maritime Unions, Held in Washington, D. C. Dec. 17-19-1941 Under Joint Auspices of the U.S.M.C. and the U. S. Dept. of Labor.)

STATEMENT OF PRINCIPLES

1. Insofar as areas, war bonuses, and insurance are concerned, it is regarded as desirable and necessary that a uniform basis for each item covering the entire nation and the entire industry be reached.

2. Without waiving the right to strike, maritime labor gives the Government firm assurance that the exercise of this right will be absolutely withheld for the period of the war, on a voluntary basis therefore this is a guarantee on the part of labor that there will be no strikes during the period of the war. Representatives of employers in the mari-

time industry also guarantee there will be no lock-outs for the period of the war.

3. The utilization of collective bargaining will in no instance be impaired or restricted by reason of any action taken at this conference. It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated. During the period of the war there shall be no limitation or curtailment of the productive or service capacities of either employer or employee.

4. To provide machinery for the settlement of disputes without interruption of service or stoppage of work during the period of the war and to insure the application of the maximum war effort and coordination of all war activities coming within the purview of the maritime industry, the Maritime War Emergency Board with the powers and purposes set forth in Exhibit A, attached hereto, will be created.

EXHIBIT A

12/18/41

Proposed Board to Expedite and Coordinate the
War Efforts of Employers and Labor in the
Maritime Industry

The unions representing the personnel of the vessels of the American Merchant Marine and the

operators of those vessels having pledged themselves to cooperate wholeheartedly in the all-out war effort of the government and to take no action during the war emergency which shall cause any interruption of the service of such vessels, it is of the utmost importance that appropriate means shall be established in order to coordinate the war efforts of employees and employers in the American Merchant Marine and to insure that all questions which may arise between them and which, if not promptly and amicably settled might lead to interruptions in such service, shall be promptly and amicably settled.

It is confidently expected that most of such questions can and will be settled through the normal procedure of collective bargaining between such unions and the steamship operators.

Under present war conditions, however, neither the unions nor the steamship operators will at all times be in position to obtain adequate information with regard to the extent of war risks in order to enable them to bargain intelligently with regard to questions relating to war risk compensation and insurance of the personnel of such vessels.

In order to afford a procedure for settling questions relating to war risk compensation and insurance which will at the same time insure that the consideration thereof shall be based upon adequate and accurate information and that such questions shall be settled in such manner as shall most certainly assist in the prosecution of the war, it is

proposed that there shall be established a board to be known as the Maritime War Emergency Board (hereinafter sometimes called the Board), or by some other suitable name, and to be composed and have the powers and duties hereinafter set forth.

The Board shall consist of three members to be named by the President of the United States with the understanding that one member shall be selected from the U. S. Department of Labor and one from the U S Maritime Commission.

Whenever any difference shall arise between any steamship operator and any union representing its employees with regard to any question relating to war risk compensation or war risk insurance of personnel of the vessels of such steamship operator and such question shall not be settled through the ordinary procedure of collective bargaining between such steamship operator and its employees, such question shall be referred to the Board by such steamship operator or such union by giving written notice to the Board and to the other party of the intention of the party giving such notice to refer such question to the Board. Such notice shall specify the question to be referred to the Board.

Upon receiving such notice the Board shall as promptly as shall be practicable afford to each party a reasonable opportunity to present evidence and argument in support of the position of such party and the Board shall thereupon render its decision

in writing with regard to such question and serve a copy thereof upon each party.

The decision of the Board upon any such question which shall be referred to it as hereinbefore set forth shall be final and binding upon all parties to the difference out of which such question arose.

The Board shall appoint advisory committees of representatives of the steamship operators and of such unions of equal representation for the purpose of consulting with and advising the Board in respect of any other matters looking toward improvement and coordination of the war effort of the United States in the Merchant Marine field.

(Sgd) JOHN J. COLLINS

Independent Unions of Licensed Officers on Tankers (Independent Unions of Unlicensed Personnel on Tankers.)

(Sgd) MATHEW D. BIGGS

Seafarers International Union of N. A.

(Sgd) A. M. HEMPHILL

National Organization Masters, Mates & Pilots of America.

(Sgd) H. MARTIN

National Organization Masters, Mates & Pilots of America.

(Sgd) JOSEPH P. SELLY

By WAYNE P. PASCAL

President, American Communications Assn.

(Sgd) GEORGE F. ANDERSON

Sec. Tr. American Merchant Marine Staff Officers Assn. Inc.

(Sgd.) E. W. WIGGINBOTHAM

Secy. Local No. 4, N. O. M. M. & P. of A.

(Sgd) CAPTAIN W. E. ANTHONY

Waterman Steamship Co. Mobile, Ala.

(Sgd) CAPT. C. F. MAY

President, American Merchant Marine Institute,
Inc.

(Sgd) FRANK J. TAYLOR

President, American Merchant Marine Institute,
Inc.

(Sgd) SAMUEL J. HOGAN

President, National Marine Engineers Beneficial
Association

(Sgd) J. B. BRYAN

Pacific American Shipowners Association

(Sgd) W. A. KIGGINS, Jr.

A. H. Bull Steamship Co. and Baltimore Insular
Line.

(Sgd) HARRY A. MORGAN

Vice President, American Communications Assn.,
C. I. O.

(Sgd) FREDERICK MYERS

Vice President, National Maritime Union

(Sgd) HOWARD McKENZIE

National Maritime Union

(Sgd) B. L. TODD

United Licensed Officers

(Sgd) HARRY LUNDBERG

Sailors Union of the Pacific

(Sgd) MORRIS WEISBERGER

Sailors Union of the Pacific

(Sgd) JACK O'DONNELL

Marine Cooks and Stewards Assn.

(Sgd) V. J. MALONE

Pacific Coast Marine Firemen, Oilers, Watertenders, Wipers Assn.

(Sgd) MARDY POLANER

Seafarers International Union of N. A., Great Lakes District.

(Sgd) JOHN HAWK

Atlantic and Gulf District of the Seafarers International Union of North America.

George Wilson and Bjorne Halling, representatives of the I. L. W. U. asked permission to initial the document after consultation with the president of their union.

(Copy)

The White House

Washington

December 19, 1941

Pursuant to the agreement reached on December 19, 1941, between representatives of the maritime industry and the labor organizations involved, and in accordance with their joint request that a board to expedite and coordinate the war efforts of the maritime industry be appointed, I hereby designate:

John R. Steelman, of the United States Department of Labor

Edward Macauley, of the United States Maritime Commission,
and

Frank P. Graham, president of the University of North Carolina to serve as members of this board.

The board shall be known as the Maritime War Emergency Board and its powers and purposes shall be those set forth in accordance with Exhibit A of the agreement referred to above.

(Signed) FRANKLIN D. ROOSEVELT

Mr. Ambler: Your Honor, if I may make a suggestion, possibly your Honor, until the matter is submitted after argument, may wish to reserve his rulings on the other exhibits until their character and their relation in the general picture is explained during my argument.

The Court: I have no objection to that suggestion. Do you have any, Mr. Levinson?

Mr. Levinson: No, I am willing to assist the Court to that extent. I am perfectly willing to stipulate with Counsel that the record may show that your Honor is reserving ruling on the admission of these exhibits until after the argument. That is what you have in mind?

Mr. Ambler: Yes. I think that would be simpler. The Court would then understand the pertinency and the general picture.

The Court: That begins with A-5 and continues to A-12. The Court wishes to rule upon the treatise

that was published in the Department of Commerce periodical.

Mr. Ambler: Your Honor has already ruled on that.

The Court: That is denied.

Mr. Ambler: Yes.

(Whereupon, Respondent's Exhibit A-13 offered in evidence and refused.)

The Court: The rest of the exhibits that I have just mentioned, the ruling will be reserved upon them; and subject to the right to have the Court later rule upon them, as the Court understands them, the Respondent rests its case in chief, is that right?

Mr. Ambler: That is correct.

The Court: Is that what you intend? Is there any rebuttal?

Mr. Levinson: I have no rebuttal testimony, your Honor. Libelants have none.

The Court: Libelants rest. Now I will hear your argument at this time.

(Argument.)

The Court: I just said to you that I didn't know that Counsel offered any exhibits that were attached to any deposition. Do you now offer those exhibits?

Mr. Ambler: This morning, your Honor, I moved the introduction of all of the exhibits.

The Court: I understood you to move the introduction of the evidence disclosed by reading of the

depositions. If you intended to so move, I will hear the opposing side. Is there any objection to these exhibits to this deposition?

Mr. Levinson: The same objection. I objected to all of them on the ground of immateriality. The only exhibits to which I did not object are the two supplemental agreements which I think are Exhibits A-3 and A-4, one of them relating to the Firemen's Union, of which three of these men are members and the other relates to the Marine Cooks and Stewards, of which one man is a member. They are both dated October 10, 1941, and October 9, 1941. Those are the only two to which I did not object. To the rest of them I most strenuously object on the ground that they are not material. They either antedate or post-date the date on which the articles were signed.

Mr. Ambler: Your Honor, I might say that at the conclusion of the testimony I moved that all of these exhibits, by name, be introduced, and suggested——

The Court: (Interrupting) I am now ready to rule upon these that are attached to the deposition of Mr. Mullins, and the objections to them are overruled, and the exhibits are admitted, along with the evidence in the case; and the Court makes that ruling because, without these offered exhibits, not only these but the others that have been offered, the Court is of the opinion that the contract is clouded with considerable obscurity and attended with intricate ramifications of unfamiliar conditions, and that these exhibits which have been

offered from time to time and to which objection has been made from time to time, and on which a great deal has been said in the course of the trial, I think that these exhibits assist in throwing some light upon this subject that is here in litigation.

Mr. Levinson: Your Honor will note my exception to that.

The Court: An exception is allowed.

(Argument.)

Mr. Ambler: Attached to the deposition of Mr. William G. Mullins are exhibits A to F, inclusive. I wish at this time to move the introduction in evidence of those six exhibits, this being a renewal of a previous offer made this morning.

The Court: These exhibits A to F, subject to these objections made by opposing counsel, which objections have been and are overruled, are now admitted.

(Whereupon, Respondent's Exhibits A to F, inclusive, were received in evidence.)

RESPONDENT'S EXHIBIT A

NATIONAL ORGANIZATION MASTERS, MATES AND PILOTS OF AMERICA

15 Moore Street, New York, N. Y.

The following is a joint submission, submitted to this Conference by the officials of the National Organization Masters, Mates & Pilots of America and the National Marine Engineers' Beneficial Association of America, with respect to War Bonus

and War Risk Insurance covering the Licensed Officers in the American Merchant Marine:

1. On vessels traversing Atlantic and South Atlantic waters on voyages to East, South and West African ports, Indian Ocean and Red Sea—100% war risk compensation shall be paid for the entire voyage.

2. On vessels going to New Zealand, Australia, the Far East and Russian ports, the war risk compensation shall be 100% for the entire voyage.

3. On vessels sailing to South American ports the war risk compensation shall be 50% of the basic wages for the entire voyage.

4. On vessels sailing to any ports in the Western Hemisphere under the protection of a belligerent nation, the compensation shall be 50% of the basic wage for the entire voyage.

5. On vessels engaged in intercoastal, coastwise, West Indian trade or Central American neutral ports, 25% compensation of the basic wage for the voyage shall be paid.

6. On vessels sailing to African ports \$50.00 shall be paid for each port entered.

7. On vessels sailing to the Red Sea, Persian, Gulf, Suez and Russian ports \$100. shall be paid for each port entered.

8. \$50.00 shall be paid on vessels for each New Zealand, Australian and Far Eastern port entered.

9. \$500.00 shall be paid as compensation for loss of personal property, such as clothing, instruments, etc. In the event of a total loss of the vessel due

to hostilities or war-like operations or in the event the vessel is interned, the licensed officers shall be paid wages, and emergency wages, and war bonus until and including the day of their arrival in a port of the United States. In such case the licensed officers shall be furnished transportation back to port of signing on.

The following is submitted with respect to War Risk Insurance:

Does hereby insure \$10,000 for account of the Master and licensed officers of the American vessel called the.....during a voyage to and fromto....., sailing about, during their employemnt on or by said vessel for the period of the aforesaid voyage, beginning, in respect to each person insured, from the time such person signs the articles for the aforesaid voyage, or, if already on articles for a series of voyages or period of time, from the inception of the aforesaid voyage (i.e., when the vessel is ready to begin the loading of cargo for the aforesaid voyage or to sail in ballast) and continuing until such person is discharged or the termination of the aforesaid voyage (i.e., when the vessel is ready to begin the loading of cargo for another voyage or to sail in ballast) whichever may first occur.

In case of claim, to be paid in funds current in the United States.

Against Loss of Life and personal injury to the master and officers, only to the extent specified in the following schedule:

Insurance will be paid in case of loss, an amount to be determined by applying the percentage shown below to the amount for which the master and officers are insured, as follows:

Life	100%
Both hands	100%
Both arms	100%
Both feet	100%
Both legs	100%
Both eyes	100%
Arm	65%
Leg	65%
Hand	50%
Foot	50%
Eye	65%
Total destruction of hearing.....	65%

This emergency compensation account of war hazards (war bonus), will be effected on the various trade routes, and shall remain fixed. However, should there be a change in the alleged war hazards in any or more particular trade route or routes, such as bombing, sinking, mining or war-like acts against American vessels, or should there be a cessation of hostilities, then negotiations shall be opened by either parties in respect to war risk compensation on account war hazards in said trade route or routes so affected, in which less than 100% war bonus is being paid.

RESPONDENT'S EXHIBIT B

At a conference terminating on this 16th day of August, 1941, held under the auspices of the United States Department of Labor and the United States Maritime Commission with the following steamship operators and unions of licensed officers in attendance and participating, to deal with the subject as announced by the Maritime Commission in the attached letters of invitation and statement made by Commissioner Macauley at the opening of the meeting on August 12, 1941, agreement was reached as follows:

War Risk areas wherein war risk bonuses shall be paid licensed officers are set forth as follows:

Area I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland.

Area II. Trans-Atlantic voyages to Russia (Archangel etc).

Area III. Trans-Pacific voyages to Russia (Vladivostok, Petropavlosk).

Area IV. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula.

Area V. Trans-Pacific voyages to New Zealand or Australia.

Area VI. Canada (Atlantic Coast).

Subject to terms and conditions following, war bonuses shall be paid in the respective areas as above defined, as follows:

Area I. 60% of basic wages for the entire voy-

age: \$75 for Suez, and \$45 for each port in the Red Sea and Persian Gulf.

Area II. 60% of basic wages for the entire voyage, and \$75 for each Russian port.

Area III. 60% of basic wages after crossing the 180th meridian, westbound, until recrossing the same meridian eastbound, and \$75 for each Russian port.

Area IV. 60% of basic wages from the crossing of the 180th meridian westbound, until recrossing the same meridian eastbound.

Area V. 60% of basic wages from arrival of vessel in Suva or the crossing of the 180th meridian, westbound, until departure from Suva or crossing the 180th meridian eastbound.

Area VI. 25% of basic wages while vessel is north of 35 degrees of north latitude.

On round-the-world voyages, westward, 60% of the basic wages from the crossing of the 180th meridian westbound until arriving in a Continental United States East Coast or Gulf Coast port, or at the Panama Canal. If any vessel referred to in Area I continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th meridian, eastbound, and thereafter no further bonuses will be payable.

For adjustment in the above listed percentages upon which bonuses are paid an Index will be compiled by the Insurance Division of the United States Maritime Commission in cooperation and in conjunction with the Department of Labor and monthly

reports will be furnished to all interested parties concerning deviations from such index as of the 15th day of each month. Such index will be based upon the fair average of war risk insurance rates paid on hulls of American flag vessels operating in all areas above described. The fair average of such rates as of the effective date of this agreement shall be listed as 100 and the corresponding percentage increases or decreases in that average shall be reflected on the Index. When the Index figures shall have reached 150 on the basis above described, which shall represent an increase of 50% in the fair average of the above described war risk insurance rates on the hulls of the American flag vessels operating in the above described areas, then the war bonus percentages aforesaid shall automatically become 75%; and in a similar manner when the Index figures shall have reached 200, which shall represent a doubling of the fair average of said insurance rates, under the method above described, when the war bonus percentages shall advance from 75% to 100%.

When the percentage figures for the payment of war bonuses shall have reached 100% this will be the maximum figure to be paid for war bonuses whether war is declared by or against the United States or whether the United States becomes an active participant in war, or not.

In the event that there is a recession in the figures of the above described index no reduction from 100% war bonus when reached shall be made until such time as the aforesaid Index figures shall have

receded to 150 on the same basis as above described and at that time the recession from 100% war bonus being paid shall be to 75%. When the Index figures shall have receded to 100 then the war bonus percentage payment shall be 60%, below which, regardless of Index figures, the war bonus figure shall not recede, except as specifically provided for hereinafter.

With respect to the Areas above described, it is understood and agreed that the Department of Labor and the United States Maritime Commission jointly will examine all facts pertaining to the same at the expiration of thirty days from the date hereof, and if it is found that inequities exist detrimental to the licensed officers who are members of organizations signatory hereto as compared to other groups employed on board vessels, then joint recommendations will be made by the Department of Labor and the United States Maritime Commission for the correction of such inequities as may be found to exist.

In the event of loss of personal effects by any licensed officer, due to the necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, each licensed officer so affected shall be reimbursed by a sum not to exceed \$500.

In the event the vessel be interned, destroyed or abandoned due to warlike operations and unable to continue her voyage, each licensed officer shall be paid wages, including Temporary Emergency Wages, to the date the licensed officers arrive in a Continental United States Port. Furthermore, in

such event arrangement shall be made by the company for repatriation of such men to a Continental United States Port.

War Risk Insurance of \$5,000 shall be furnished each licensed officer on voyages described in the above Danger Areas, said sum to be paid to the estate or to the designated beneficiary of such licensed officer in case of death or total and permanent disability as a result of war conditions, and to the payment to such licensed officer of any sum to which he may be entitled for any injury resulting from said War Conditions.

The above agreement shall become effective on all vessels at sea or in port under the jurisdiction of the operators signatory hereto as of the 16th of August, 1941, and shall remain in force as to each area described herein until its abolition, as may be anticipated upon cessation of hostilities between warring nations, as proclaimed by the President of the United States or otherwise.

The other steamship companies hereinbefore mentioned as parties hereto are:

Mississippi Shipping Company

A. H. Bull Steamship Company

Baltimore Insular Line, Inc.

Waterman Steamship Corporation

It is understood and agreed that the Pacific American Shipowners' Association and the American Merchant Marine Institute, Inc. were here repre-

sented and authorized to deal for and in behalf of all member companies of said associations.

For the Associations:

/s/ FRANK J. TAYLOR,
President, American Merchant Marine Institute,
Inc.

/s/ J. B. BRYAN,
President, Pacific American Shipowners' Association

For the U. S. Maritime Commission:

/s/ E. S. LAND
By DANIEL S. RING

For the Licensed Officers:

/s/ JAMES J. DELANEY
National Organization Masters, Mates and Pilots
of America

/s/ S. J. HOGAN
National Marine Engineers'
Beneficial Association

/s/ B. L. TODD
United Licensed Officers
Association

For the U. S. Department of Labor:

/s/ W. C. LILLER
/s/ OMAH H. HOSKINS

Dated August 16, 1941.

(Copy)

United States Maritime Commission
Washington

July 22, 1941

Mr. Frank J. Taylor, President
American Merchant Marine Institute, Inc.
11 Broadway
New York, New York

Dear Mr. Taylor:

A series of conferences are being called on August 12, August 15, and August 19, 1941, between representatives of seagoing organized labor and offshore steamship operators for the purpose of affording these representatives an opportunity of reaching a decision covering the payment of war bonuses on a national uniform basis.

These conferences will be held under the auspices of the Department of Labor and the Maritime Commission, and will take place in Room 7856 of the Department of Commerce Building, at 10:00 A.M., on the dates mentioned above. The first conference, on August 12, will be devoted to the question of war bonuses as they affect licensed and registered officers; on August 15, as they affect radio operators; and on August 19, as they affect unlicensed personnel.

This letter constitutes a formal invitation for your association to be represented and participate in these deliberations.

As the executive officer of your association, the designation of your representatives will be left to

your discretion, but it is hoped that in such designation you will have in mind the benefits to be derived from a small but adequate representation.

Will you advise me of your acceptance of this invitation, as well as of the names of those who, with you, will represent your organization.

A communication identical to this is being sent to Mr. A. O. Woll, Secretary of the Pacific American Tank Ship Association, and to Mr. J. B. Bryan, President of the Pacific American Shipowners Association. If you think it is desirable that invitations be sent to others than those mentioned herein, will you kindly advise me to that effect.

Sincerely yours,

(Signed) E. S. LAND

E. S. Land,

Chairman

(Copy)

Dear Mr.

A series of conferences are being called on August 12, August 15, and August 19, 1941, between representatives of seagoing organized labor and off-shore steamship operators for the purpose of affording these representatives an opportunity of reaching a decision covering the payment of war bonuses on a national uniform basis.

These conferences will be held under the auspices of the Department of Labor and the Maritime Commission, and will take place in Room 7856 of the Department of Commerce Building, at 10:00 A.M., on the dates mentioned above.

The conference which will consider the question of war bonuses as they relate to licensed and registered officers will take place on Tuesday, August 12, and this letter constitutes a formal invitation for your organization to be represented and participate in these deliberations.

As the executive officer of your organization, the designation of your representatives will be left to your discretion, but it is to be hoped that in such designation you will have in mind the benefits to be derived from a small but adequate representation.

Will you advise me of your acceptance of this invitation, as well as of the names of those who, with you, will represent your organization.

Sincerely yours,

E. S. LAND

Chairman

Opening Remarks by Commissioner Macauley
At Conference on War Bonuses

12 August 1941

As you know from the letters inviting you to be present, this conference between representatives of the licensed officers' organizations and representatives of the off-shore steamship operators is being held under the auspices of the Department of Labor and the U. S. Maritime Commission, in order to permit these representatives an opportunity to present to the Department of Labor and the Maritime Commission their views as to the determination of a proper national uniform basis for payment of

war bonuses to the licensed officers of American merchant ships.

It is desired that this conference be confined strictly to the purpose for which it has been called, i.e., to achieve a nationwide agreement on war risk compensation. It is considered that other subjects, such as wages, hours and working conditions, are extraneous and not pertinent to the discussion.

It is also desired that any agreement reached should be final and binding on all parties and independent of any existing or future agreements as to basic wage scales and working conditions.

It is not contemplated that a single rate for all of the various services, regardless of the destination of the vessels, should be put into effect, but rather that in each danger area the rates should be uniform regardless of the port of original departure.

The agreement arrived at should remain in force except in one of the following:

(a) Declaration of war by or against the United States.

(b) Change of danger or combat zones proclaimed by the President of the United States.

(c) Abolition of all danger zones as may be anticipated on the cessation of hostilities between the warring countries.

In either of the first two contingencies, similar conferences shall be called by the Maritime Commission and the Department of Labor, to re-examine the question of war bonuses.

If a basic formula for future action is worked out, provision should be made to take care of the com-

pensation to be paid in a new area on the same relative basis as is prescribed for existing areas under the general formula.

The Commission does not desire to prescribe the agreement to be arrived at, but does insist that the scope of the discussion be confined to the subject of war bonuses. The Commission urges that this matter be settled as speedily as possible, in a spirit of fairness and cooperation, so that the result may not only be a mutually satisfactory and agreeable working arrangement, but an urgent and important contribution to the National Defense.

RESPONDENT'S EXHIBIT C

American Merchant Marine Institute, Inc.

11 Broadway—New York

August 18, 1941

To Members of the American Merchant Marine
Institute, Inc.

Gentlemen:

Stabilized War Bonus Agreement—Licensed
Officers Conference at Washington, D.C.,
August 12-16, 1941

As a result of joint conferences between representatives of the licensed officers' unions and the steamship operators, represented by the American Merchant Marine Institute, Inc., and the Pacific American Shipowners Association, and other companies, held under the joint auspices of the U. S.

Department of Labor and the U. S. Maritime Commission, a uniform agreement covering war risk compensation for licensed officers was arrived at and signed in behalf of the steamship companies and unions, and with the signatures of the Department of Labor and Maritime Commission also affixed.

The new agreement, which will apply uniformly on all Coasts, provides for a bonus of 60% of basic wages in lieu of the present 50%; extends the war bonus area in the Pacific Ocean to the 180th Meridian instead of the 160th Meridian of East Longitude which formed the previous boundary. Voyages to Iceland or Greenland will be compensated for by a 60% bonus. Loss of personal belongings due to sinking of vessel, etc., will be compensated for up to \$500. The new agreement provides for continuance of basic wages and temporary emergency wages in case of internment, until arrival back in the United States, but payment of bonus does not continue under such circumstances.

Provision to stabilize the payment of war bonuses in the future is provided in the agreement by an Index number of war risk insurance rates, to be compiled by the Insurance Division of the Maritime Commission as of August 16, 1941. The Index will be based upon the fair average of war risk insurance rates paid on hulls of American-flag vessels operating in all areas provided for in the agreement. The fair average of such rates as of August 16, 1941 will be listed as 100 and corresponding in-

creases or decreases noted in the Index. It is agreed that if the Index reaches 150 the war bonus percentage will automatically become 75%, and if the Index reaches 200 then the war bonus shall advance to 100% which will be the maximum figure to be paid whether war is declared by or against the United States or whether the United States becomes an active participant in war. By the same token, recession in the Index will call for reduction in war bonus as indicated in the agreement.

There are enclosed for your information copies of the following:

1. Joint proposals submitted by the National Organization Masters, Mates and Pilots of America and the National Marine Engineers' Beneficial Association.

2. Brief submitted by the National Marine Engineers' Beneficial Association.

3. Brief submitted by the United Licensed Officers of America.

4. Brief submitted by the American Merchant Marine Institute, Inc.

5. Agreement arrived at as a result of the conference.

The conferences will continue tomorrow, August 19, for the unlicensed personnel, at which the committee of the Institute will be represented in behalf of its members. The conferences for the staff officers and radio operators, originally scheduled for August 15, have been postponed until August 26, 1941.

You will be kept advised of further developments.

Very truly yours,

FRANK J. TAYLOR

President.

RESPONDENT'S EXHIBIT D

National Defense Mediation Board

Case No. 80

In the Matter of

AMERICAN MERCHANT MARINE INSTI-
TUTE, INC., PACIFIC AMERICAN SHIP
OWNERS ASSOCIATION, WATERMAN
STEAMSHIP CORPORATION

and

SEAFARERS' INTERNATIONAL UNION OF
NORTH AMERICA, SAILORS' UNION OF
THE PACIFIC—AFL.

The division of the Board which heard this case was composed of Charles E. Wyzanski, Jr., representing the public, George H. Mead, representing employers, and Robert J. Watt, representing employees.

Hearings were held on September 29 and on October 1, 2, 3, and 4, 1941.

RECOMMENDATIONS

1. Crews on American vessels sailing to foreign ports perform an essential role in the national defense effort. Sound relationship between representatives of these crews and owners of these vessels are of great consequence to the nation.

2. The Seas Shipping Company, Inc., the Calmar Steamship Corporation, the South Atlantic Steamship Company, and the Alcoa Steamship Company, Inc., on the East Coast are associated in the American Merchant Marine Institute, Inc. Most of the owners on the West Coast are associated in the Pacific American Shipowners Association. The Waterman Steamship Corporation is not affiliated with either group.

3. The unlicensed personnel before the National Defense Mediation Board are represented by Seafarers' International Union of North America and Sailors Union of the Pacific. (The licensed personnel are represented by other unions. Their problem is not dealt with here.)

4. Collective bargaining relationships have been established by most of these owners with one or the other of these unions. In most cases, collective bargaining contracts now exist or have just expired. For the negotiation of such general contracts the parties have worked out among themselves appropriate methods. These methods usually include the parties requesting the United States Department of Labor to station a Commissioner of Conciliation as an observer and mediator at the collective bar-

gaining negotiations. These recommendations do not affect those methods or any unexpired contracts.

5. However, a special problem arises from the risk run by men who go to sea in time of war. This problem has not been solved by the existing or contemplated contracts. It is with this problem that these recommendations are concerned.

6. The first part of this problem is to provide for bonuses for war risk which will be fair under present conditions. The second part of this problem is to provide machinery for making equitable future adjustments if conditions change.

7. To meet the first part of the problem, the National Defense Mediation Board recommends that until changed, as provided in paragraph 8, the following war bonus rules shall govern those who become signatory to these recommendations:

a. There shall be five war risk areas, namely:

I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coast of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.

II. Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)

III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian

westbound, until recrossing the same Meridian eastbound.)

IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

V. Canada (Atlantic Coast) (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port.)

b. An able-bodied seaman shall be paid a war risk bonus at the rate of \$80 a month in the first four areas and \$33 in the fifth area. Other unlicensed personnel shall be paid the same bonus.

c. There shall be paid to able-bodied seamen in addition to the area bonus just provided, the following port bonuses:

(1) for the port of Suez, or any other port which is subject to regular bombing, \$100, plus \$5 per day for each day beyond five days that the vessel is in that port.

(2) for any port in the Red Sea or in the Persian Gulf not covered by paragraph (1) Supra. \$45. The same bonuses shall be paid other unlicensed personnel. The Board makes no recommendation as to port bonuses for Vladivostok or ports in Iceland.

8. To meet the second part of the problem, the National Defense Mediation Board recommends that the following machinery for making equitable future adjustments shall govern those who become signatory to these recommendations.

a. Any signatory may ask for a change, an addition to, or subtraction from the present war bonus rules set forth above if the present situation is changed by an Act of Congress, executive action, the spread or contraction of the area of hostilities in the Eastern or Western hemisphere, the entry into the war or withdrawal from the war of belligerents, or the rise or fall of sinkings of American vessels. Such proposed change shall be limited to the areas where conditions are alleged to have changed.

b. The signatory asking for the change shall present his request in writing to the party from whom the change is sought. (Meetings shall occur at once.) If agreement between them is not reached one week after the request is present, either party may present the matter to the United States Department of Labor, Division of Conciliation for conciliation. If conciliation is not successful in one week after the matter was presented to the Division of Conciliation, the Director of the Division may then refer the case to a board composed of three disinterested persons to be appointed by the President of the United States. Such Board shall have power to make recommendations.

9. The recommendations in paragraph (8) shall be effective until November 1, 1943. Paragraph (7) shall be effective until November 1, 1942. During the period of these recommendations there shall be in connection with and on account of war bonus issues, no lockout, strike, slow-down, or like action

by either owners or men represented by those who become signatories to these recommendations.

10. Nothing in these recommendations shall be interpreted so as to reduce benefits now existing under collective bargaining contracts. Except as herein modified, existing contracts and arrangements shall continue.

11. These recommendations shall become effective upon all ships which sailed on or after August 16, 1941 or any earlier effective date set by special rider.

12. If any dispute arises as to the interpretation of these recommendations, and if the parties cannot adjust that dispute by collective bargaining, either party may refer it to the Division of Conciliation for conciliation, and, if conciliation fails, either party may refer it to the three-man board referred to in paragraph (8) for interpretation.

NATIONAL DEFENSE MEDI-
ATION BOARD

By (sgd) CHARLES E. WYZANSKI, Jr.
(sgd) ROBERT J. WATT

RESPONDENT'S EXHIBIT E
Supplementary Agreement
Between
National Maritime Union of America
and

.....

This Agreement made this sixth day of November, 1941, by and between (hereinafter

referred to as the "Company"), and the National Maritime Union of America (hereinafter referred to as the "Union") Witnesseth:

Whereas, Article I, Section 15 (b) of the collective bargaining agreement between the Company and the Union, dated October 31, 1941, and expiring September 30, 1943, provides for the opening of negotiations by the Union for added remuneration or bonuses on account of vessels of the Company traversing waters in the proximity of warlike activities, and

Whereas, negotiations have been carried on pursuant to said Article I, Section 15 (b), of the Agreement

Now, Therefore, It Is Hereby Agreed That:

1. The emergency compensation to cover war risk hazards to the unlicensed personnel of the Company's vessels shall be as follows:

(a) On the trans-Pacific Far East and Australian runs, \$80 per month from the 180 meridian, westbound, until return to the 180th meridian, eastbound.

(b) On voyages trans-Pacific from the United States to Australia or the Far East and continuing westward to return home via ports in Africa, the Cape of Good Hope and the Atlantic Ocean, \$80 per month from the time the vessel passes the 180th meridian westbound until arrival at first continental United States Coast port.

(c) On voyages trans-Atlantic from the United States to ports in Africa, India, Ceylon, and/or Burma and continuing eastward to return home via

the Pacific Ocean, \$80 per month from departure last continental United States Atlantic Coast port until passing the 180th meridian homebound.

(b) On voyages trans-Atlantic from the United States to ports in North and West Spain, Portugal, Africa, India, Ceylon and/or Burma, and returning westbound, via Africa and the Atlantic Ocean, \$80 per month from departure last continental United States Atlantic Coast port until return to first continental United States Atlantic Coast port.

(c) If a vessel enters the Persian Gulf and/or the Red Sea including the port of Aden, \$45 additional for each port of call in these areas and \$100 for entering the Suez Canal at the first pair of fixed red and green lights, port and starboard, at the southern entrance of the Canal in line with the Government Hospital in the town of Suez. If a vessel remains in the port of Suez beyond five days, \$5.00 per day additional shall be paid for each day beyond five days.

(d) On voyages from the United States to Iceland and/or Greenland, \$80 per month from departure last continental United States Atlantic Coast port until return to first continental United States Atlantic Coast port.

(e) For one or more calls at ports or bases in Iceland within the confines of Faxa Bugt, \$45 additional, and for one or more calls at ports or bases in Iceland, outside the confines of Faxa Bugt, \$45 additional; provided that the total port bonus payment for the voyage is not to exceed \$90.

(h) On voyages from the United States to any port in the Dominion of Canada, Atlantic Ocean, including Newfoundland and Nova Scotia, \$33 per month while a vessel is north of 35 degrees of north latitude and bound directly to or from, or while it is in, any such port, until return to first continental United States Atlantic Coast port.

2. The Company will furnish as promptly as possible through the medium of private insurers war risk insurance in the amount of \$5,000 for each unlicensed member of the crews of its vessels on all voyages in the areas described above. Such policy shall provide for the payment of the said sum of \$5,000 to the estate or designated beneficiary of such unlicensed member of the crew in case of death due to war conditions or the payment of said sum in periodic installments to the unlicensed member of the crew himself in the event of his total and permanent disability due to such war conditions, and shall provide for payment to the unlicensed member of the crew of such sum less than \$5,000 in case of injury less than total or permanent disability resulting from such war conditions as are provided in the form of policy generally adopted by American underwriters to cover such war risks and known as Crews' War Risk Insurance Form—1941. The policy or certificate of insurance shall be available for inspection at the offices of the company, and the prompt procuring of such policy shall be a full and complete compliance with the Company's obligation under this paragraph. It is understood that in the event war risk insurance is

made available by the United States Government, the Company and the Union will enter into discussions insofar as it relates to this section.

3. In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Company and the Union, dated October 31, 1941, shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port.

4. The Company agrees that it will pay each unlicensed member of the crews of its vessels the value of all personal effects lost or damaged due to hostilities or war-like operations up to a total sum of one hundred and fifty (\$150) dollars per man.

5. Either the Company or the Union shall be privileged, upon ten days' notice in writing, Saturdays, Sundays, and holidays excluded, to reopen negotiations on war bonuses. Any dispute arising from such negotiations shall be referred to a Board composed of three representatives of the Company and three representatives of the Union. In the event the dispute is not settled by such Board, it shall then be submitted to arbitration in accordance with Article XII, Section 2 of the collective bargaining agreement between the Company and the Union dated October 31, 1941.

6. This Supplementary Agreement shall become effective on October 1, 1941, on all ships, whether at sea or in port, and shall continue until Septem-

ber 30, 1943, or such other date upon the termination of the present emergency as shall be mutually agreed upon, whichever shall occur earlier.

7. Any prior war bonus agreement or agreements between the Company and the Union are hereby superseded.

For the

NATIONAL MARITIME UNION
OF AMERICA

.....

Witness

For

.....

.....

Witness

—

RESPONDENT'S EXHIBIT F

Supplementary Agreement No. 2

between

National Maritime Union of America

and

.....

This Agreement made this second day of December, 1941, by and between (hereinafter referred to as the "Company"), and the National Maritime Union of America (hereinafter referred to as the "Union"), Witnesseth:

Whereas, Article I, Section 15 (B) of the collec-

tibe bargaining agreement between the Company and the Union, dated October 31, 1941, and expiring September 30, 1943, provides for the opening of negotiations by the Union for added remuneration or bonuses on account of vessels of the Company traversing waters in the proximity of warlike activities, and

Whereas, negotiations have been carried on pursuant to said Article I, Section 15 (b), of the Agreement, and

Whereas, the Supplementary Agreement between the Company and the Union, dated November 6, 1941, does not provide for the payment of emergency compensation to cover war risk hazards in certain areas

Now, Therefore, It Is Hereby Agreed That:

1. The emergency compensation to cover war risk hazards to the unlicensed personnel of the Company's vessels shall be as follows:

(a) On voyages trans-Atlantic from the United States to ports in Russia, \$80 per month from departure last continental United States Atlantic Coast port until return to first continental United States Atlantic Coast port.

(b) For one or more calls at ports or bases in Russia within the confines of the Gulf of Archangel between Durakova on the west and Zimnegorski on the east, \$125 additional, and for one or more calls at ports or bases in Russia in the Murmansk area between the Ribachi Peninsula on the west and Kildin Island on the east, \$125 additional.

(c) On voyages trans-Atlantic from the United States to ports in the United Kingdom and/or Eire, \$80 per month from departure last continental United States Atlantic Coast port until return to first continental United States Atlantic Coast port.

(d) For one or more calls at ports or bases in the United Kingdom and/or Eire, \$150 additional.

2. If any other areas providing for one or more calls at ports or bases in Russia are established and agreed upon, the same conditions as set forth in Section 1 (b) above shall apply.

3. The Company will furnish as promptly as possible through the medium of private insurers war risk insurance in the amount of \$5,000 for each unlicensed member of the crews of its vessels on all voyages in the areas described under (a) and (c) above. Such policy shall provide for the payment of the said sum of \$5,000 to the estate or designated beneficiary of such unlicensed member of the crew in case of death due to war conditions or the payment of said sum in periodic installments to the unlicensed member of the crew himself in the event of his total and permanent disability due to such war conditions, and shall provide for payment to the unlicensed member of the crew of such sum less than \$5,000 in case of injury less than total or permanent disability resulting from such war conditions as are provided in the form of policy generally adopted by American underwriters to cover such war risks and known as Crews' War Risk Insurance Form 1941. The policy or certificate of insurance shall be available for inspection at the

offices of the Company, and the prompt securing of such policy shall be a full and complete compliance with the Company's obligation under this paragraph. It is understood that in the event war risk insurance is made available by the United States Government, the Company and the Union will enter into discussions insofar as it relates to this section.

4. In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Company and the Union, dated October 31, 1941, shall be paid to the date the members of the crew arrive in a continental United States port and the employees shall be repatriated to a continental United States port.

5. The Company agrees that it will pay each unlicensed member of the crews of its vessels the value of all personal effects lost or damaged due to hostilities or war-like operations in the war risk areas mentioned herein only, up to a total sum of two hundred and fifty dollars (\$250) per man.

6. Either the Company or the Union shall be privileged, upon ten days' notice in writing, Saturdays, Sundays and holidays excluded, to reopen negotiations on war bonuses. Any dispute arising from such negotiations shall be referred to a Board composed of three representatives of the Company and three representatives of the Union. In the event the dispute is not settled by such Board, it shall then be submitted to arbitration in accordance with Article XII, Section 2 of the collective bargaining

agreement between the Company and the Union, dated October 31, 1941.

7. This Supplementary agreement shall become effective on December 2, 1941, and shall continue until September 30, 1943, or such other date upon the termination of the present emergency as shall be mutually agreed upon, whichever shall occur earlier.

For

NATIONAL MARITIME UNION
OF AMERICA

.....

Witness

For

.....

.....

Witness

The Court: Now, I would like to see any other unadmitted exhibits. I want to get this exhibit matter finished. Is there another deposition with exhibits attached to it?

Mr. Ambler: Yes, your Honor. I will reach that in just a second. I return Mr. Mullins' deposition to your Honor.

Now, in connection with the deposition of Mr. Bryan, I wish to move the introduction in evidence of Respondent's Exhibits G, H, I and J attached to Mr. Bryan's deposition.

The Court: Is there any objection?

Mr. Levinson: Yes, your Honor. I object to those upon the same grounds, upon the ground of materiality, that they are immaterial.

The Court: I see something called Respondent's Exhibit A here.

Mr. Ambler: That has already been introduced in evidence, by another witness.

The Court: There seems to be a skip from D to——

Mr. Ambler: (Interrupting) Those, the intervening exhibits, have already been introduced in evidence in the previous deposition.

The Court: I have before me Exhibit G attached to the Bryan deposition.

Mr. Ambler: Yes. I am asking the introduction in evidence of that and H, I and J, which were all identified by that witness.

The Court: Did you wish to state anything further on this offer, Mr. Levinson?

Mr. Levinson: I want the record to show my objection on the ground of immateriality. They don't concern the same parties, and the dates antedate the date of the agreement; so on that ground, I think they are irrelevant.

The Court: The objection is overruled and those Exhibits G to J attached to the deposition of J. B. Bryan are now admitted in evidence.

(Whereupon, Respondent's Exhibits G to J, inclusive, were received in evidence.)

RESPONDENT'S EXHIBIT G

August 12, 1941

PROPOSALS

Submitted by the American Merchant Marine Institute and the Pacific American Shipowners' Association to establish "Danger Zones" and "Bonus Payments" for voyages in such zones.

Danger Zones wherein special bonuses shall be paid licensed officers are set forth as follows:

Zone I.—Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, or India.

Zone II.—Trans-Atlantic voyages to Russia (Archangel, etc.)

Zone III.—Trans - Pacific voyages to Russia (Vladivostok, Petropovlosk)

Zone IV.—Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, and Malayan Peninsula.

Zone V.—Trans-Pacific voyages to New Zealand or Australia.

Zone VI.—Canada

Bonuses payable for voyages to above defined zones shall be as follows:

1. In Zones, I, II, and III, 50% of Basic plus Temporary Emergency Wage for the entire voyage.

2. In Zone IV, 50% of Base plus Temporary Emergency Wage from the crossing of the 160th Meridian of East Longitude, westbound, until crossing the same meridian eastbound.

3. In Zone V, 50% of Base plus Temporary Emergency Wage from the arrival of a vessel in Suva or the crossing of the 180th meridian, west-bound, until departure from Suva or crossing the 180th meridian eastbound.

4. In Round the World voyages, 50% of Base plus Temporary Emergency Wage from the crossing of the 160th meridian of East Longitude, west-bound, until arrival in New York.

5. On voyages to Red Sea or Persian Gulf areas described in Zone I, an additional \$75 shall be paid to each licensed officer if the vessel calls at Suez and \$45 additional shall be paid each Licensed officer for each other port of call in the Red Sea or Persian Gulf.

6. On voyages to Russia described in Zones II and III, \$45 additional will be paid each licensed officer for each call at Russian Ports.

7. In the event of loss of personal effects by an licensed officer, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, each licensed officer so affected will be reimbursed by a sum not to exceed \$300.00.

8. In the event the vessel be interned, destroyed or abandoned due to warlike operations and unable to continue her voyage, each licensed officer shall be paid wages, including Temporary Emergency Wages, to the date the licensed officers arrive in a Continental United States Port. Furthermore, in such event arrangement shall be made by the company for repatriation of such men to a Continental United States Port, and the bonus shall be paid

while the men are in the Danger Zones described above.

9. War Risk Insurance: \$5000 shall be furnished each licensed officer on voyages described in the above Danger Zones, said sum to be paid to the estate of such licensed officer in case of death or total and permanent disability as a result of war conditions, and to the payment to such licensed officer of any sum to which he may be entitled for any injury resulting from said War Conditions.

10. The above described Danger Zones and Bonus payments shall remain in force except as follows:

(a) Declaration of war by or against the United States.

(b) Change of Danger or Combat Zones proclaimed by the President of the United States.

(c) Abolition of all Danger Zones as may be anticipated on the cessation of hostilities between warring countries.

11. The above agreements to be effective on all vessels as of the effective date of signing the agreements.

RESPONDENT'S EXHIBIT H

WAR BONUS PROPOSALS

Pacific Coast Marine Firemen, Oilers,
Watertenders & Wipers Association

September 15, 1941

Effective until further notice, the following war

zones or areas rendered unsafe by reason of hostilities are defined as follows, and war bonuses and special conditions are specified for such voyages.

A. In the Australian Run—From the arrival of a vessel westbound at Suva until its departure from Suva eastbound:

1. \$90.00 per month to all employees entitled to receive \$120.00 or less as basic monthly wages;
2. 75% of the basic monthly wages to all employees entitled to receive basic monthly wages in excess of \$120.00.

B. Trans-Pacific Passenger and Freight Service—From the crossing of the 160th west meridian westbound until the crossing of the same meridian eastbound:

1. \$90.00 per month to all employees entitled to receive \$120.00 or less as basic monthly wages;
2. 75% of the basic monthly wages to all employees entitled to receive basic monthly wages in excess of \$120.00

C. Round - the -World Service — Passenger or Freighter—Westbound:

1. To all employees entitled to receive \$120.00 or less as basic monthly wages the following shall be paid: \$90.00 per month from the 160th west meridian westbound until arrival in New York;
2. To all employees entitled to receive basic monthly wages in excess of \$120.00 there shall be paid 75% of such basic monthly wages from the 160th west meridian westbound until arrival in New York.

3. (a) An additional \$100.00 shall be paid to each member of the crew if the vessel calls at the Port of Suez, and \$75.00 additional for each other port of call in the Persian Gulf or Red Sea.

(b) The above bonus for the Port of Suez shall be calculated for a stay of not more than five days. In the event the vessel stays longer than five days, an additional Ten Dollars daily shall be paid each member of the unlicensed engine-room personnel until the vessel's departure for sea.

D. On voyages from East Coast Continental United States ports to Portugal, Spain or Africa:

1. To all employees entitled to receive \$120.00 or less as basic monthly wages to the sum of \$90.00 per month shall be paid from date of departure from last United States East Coast Continental port until return arrival westbound to first United States East Coast Continental port;

2. To all employees entitled to receive basic monthly wages in excess of \$120.00, 75% of such basic monthly wages shall be paid from the date of departure from the last United States East Coast Continental port until return arrival westbound to first United States East Coast Continental port.

3. (a) An additional \$100.00 shall be paid to each member of the crew if the vessel calls at the Port of Suez, and \$75.00 additional for each other port of call in the Persian Gulf or Red Sea.

(b) The above bonus for the Port of Suez shall be calculated for a stay of not more than five days. In the event the vessel stays longer than five days, an additional Ten Dollars daily shall be paid each

member of the unlicensed engine-room personnel until the vessel's departure for sea.

E. If any vessel referred to in said Section D. continues on its voyage eastbound to United States ports by India and the Pacific Ocean, said bonus rates shall continue until the vessel passes the 160th west meridian eastbound.

After the vessel passes the 160th west meridian eastbound, no further bonuses will be payable.

F. For the purpose of this Section Aden shall be considered a Red Sea port.

G. Trans-Pacific voyages to Vladivostok, Petropavlosk, and Siberian Ports—From the crossing of the 160th west meridian westbound until the crossing of the same meridian eastbound.

1. \$120.00 per month to all employees entitled to receive \$120.00 or less as basic monthly wages;

2. 100% of the basic monthly wages to all employees entitled to receive basic monthly wages in excess of \$120.00.

3. An additional \$100.00 shall be paid to each member of the crew for calls at each Siberian port (Vladivostok, Petropavlosk, etc.)

H. Voyages to Iceland:

1. \$120.00 per month to all employees entitled to receive \$120.00 or less as basic monthly wages;

2. 100% of the basic monthly wages to all employees entitled to receive basic monthly wages in excess of \$120.00;

3. An additional \$100.00 shall be paid to each member of the crew for calls at the Port of Reykjavik.

I. Japanese Ports: In the event any Trans-Pacific vessels call at any Japanese ports, an additional \$50.00 per man shall be paid for each port.

J. West Indies: Vessels calling at belligerent ports in the West Indies shall pay a minimum bonus of \$25.00 per man.

K. All such bonuses apply to vessels with normal cargoes. On vessels carrying TNT, bombs, artillery, artillery shells, ammunition, aviation gas, tanks and such war materials for combatant service, bonuses as detailed above shall be doubled.

L. Night Watches in Port of Suez, Port Sudan, Suakin:

(a) Men required to stand watches at night shall be paid overtime at the rate of \$1.60 per hour between the hours of 5 P. M. and 8 A. M.

(b) Men not required to stand watches at night in such ports shall be paid room rent in order to sleep at hotel as far from the docks as possible.

M. (a) War risk insurance against death, injury or mutilation, in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this section.

(b) All articles shall show clearly the beneficiary to whom such insurance shall be paid.

N. In the event the vessel be interned, and for this reason be unable to continue her voyage, wages and bonus provisions shall continue to the date members arrive in a Continental United States port. In such event, the company concerned shall arrange repatriation of such men to a Continental United States port.

O. In the event the vessel be destroyed by submarine, mines, or acts of war, wages and bonus provisions shall continue to the date members arrive in a Continental United States port. In such event, the company concerned shall arrange repatriation of such men to a Continental United States port.

P. In the event of loss of personal effects by any member of the crew due to necessity of abandoning ship resulting from torpedoing, mining, or bombing of the vessel, each man so affected shall be reimbursed by the amount of \$150.00.

Q. While men so affected are awaiting transportation, meal money and quarters allowance shall be paid.

RESPONDENT'S EXHIBIT I

SAILORS' UNION OF THE PACIFIC

Headquarters, Maritime Hall Building, 57-59
Clay Street, San Francisco. Telephone, Office:
EXbrook 2228, Dispatcher: EXbrook 2229, Cable
Address "Sailors".

Harry Lundeborg, Secretary-Treasurer

J. H. Prevost, Assistant Secretary

Ed Coester, Seattle, Wash.

J. W. Massey, Portland, Ore.

E. Arnold, San Pedro, Calif.

C. Christiansen, Honolulu, T. H.

M. Weisberger, New York

September 16, 1941

Mr. Jack Bryan,
Pacific American Shipowners' Association,
Room 700, Federal Reserve Bank Building,
San Francisco, California.

Dear Sir:

The Sailors' Union of the Pacific believes there are adequate reasons to negotiate a new bonus agreement for sailors manning vessels sailing into belligerent waters. There are various reasons justifying our demands for more adequate bonus arrangements than now prevail.

1. On May fifth the American Steamer Robert Moore was torpedoed in the South Atlantic by a Nazi submarine. The crew were in lifeboats for eleven days suffering the tortures of hell.

2. On September 9, the American steamer Steel

Seafarer was sunk in the Red Sea by a Nazi submarine.

3. On September 11, the steamer *Arkansan*, lying in the port of Suez was bombed by a Stuka bomber.

4. Less than a week ago the President of the United States announced a policy for the United States which is generally conceded to be a practical declaration of war on German and Italian war-ships, submarines and bombers which interfere with American shipping.

5. On September 15, President Roosevelt proclaimed that the American flag ships will now carry war materials such as munitions, etc. to the Allies, which means that American ships will carry materials declared contraband by Axis Powers, to such ports as Australia, New Zealand, (British Oriental ports such as Singapore and Hongkong; British Indian ports, Persian Gulf ports; Red Sea ports; East, South and West African ports.

6. This means that it will increase the danger for American seamen who sail these vessels without any protection whatsoever. They must sail without convoys; without even a single gun mounted on these merchant ships to protect themselves. In other words, if an American ship is attacked, it means that the crew is at the mercy of the attacker without any protection whatsoever.

8. The Lend-Least Act provides funds for practically everything and everybody. It provides American shipowners, in addition to Government subsidies, sufficient profits that they in turn can

more than allow for the modest demands set forth herewith for the seamen who must sail these ships carrying Lend-Lease and other materials. These seamen must risk their lives to bring materials to countries at war, and while we accept the fact that the shipowners must direct operations from the comparative safety of their desks ashore, on the other hand we believe they are morally obligated to provide sufficient relief for the seamen who take their vessels out under present day conditions. As stated before, they must take these vessels out with no protection whatsoever; without convoy and without even a single gun to protect themselves.

Based on the foregoing, we herewith submit the following demands:

1. On vessels sailing the Australian run, both passenger and freight service, \$3.00 a day shall be paid each member of the deck department from the time the vessel is crossing the equator southbound until crossing the equator northbound.

2. Trans-Pacific and East Indian run, passenger and freight service. \$3.00 per day shall be paid each member of the deck department from the day vessel crosses the 160th west meridian, westbound, until the crossing of the same meridian eastbound.

3. The round-the-world service, passenger and freight, westbound, \$3.00 per day shall be paid each member of the deck department from the crossing of the 160th western meridian westbound until arrival in the first continental American port on the Atlantic coast.

4. On voyages from east coast continental ports to Africa, India, West Africa, South Africa and East Africa to the Red Sea, Persian Gulf, India, \$3.00 per day shall be paid each member of the deck department from the last United States east coast continental port until return arrival westbound to first United States east coast continental port.

5. If any vessels referred to in Section 4. continue on their voyages eastbound to the United States ports via India or the Pacific Ocean, said bonus rates will continue until vessel passes the 160th western meridian Eastbound.

6. On vessels entering the port of Suez and Port Said, each member of the deck department shall be paid an additional \$300.00 bonus and for each other port of call in the Red Sea or Persian Gulf each member of the deck department shall receive an additional \$100.00 war bonus. The Ports of Aden and Djibuti shall be considered Red Sea ports.

7. In all West African, South and East African ports outside of the Red Sea area, each member of the crew shall be paid an additional \$50.00 per man.

8. In ports where air raids prevail, each member of the crew shall be paid an additional bonus of \$300.00 per man.

9. On vessels entering the port of Vladivostok or any other Soviet-Pacific port, each member of the deck department shall be paid an additional bonus of \$200.00 per man.

10. On any vessel entering Japanese ports each member of the deck department shall receive an additional \$50.00 bonus.

11. War risk insurance in case of death of a seaman resulting from war conditions, such as vessel being torpedoed, striking a mine, being bombed, wrecked, stranded or otherwise resulting from unusual conditions of navigation caused by war conditions, the sum of \$10,000.00 in cash shall be paid to the nearest relative of the deceased and/or his dependents, by the shipowners or their insurance brokers.

12. For the loss of clothes resulting from the vessel being torpedoed, striking a mine, being bombed, wrecked, stranded or otherwise resulting from unusual conditions of navigation caused by war conditions, seamen shall be paid \$250.00 in cash by the shipowners. Carpenters shall receive \$100.00 additional for the loss of their tools.

13. In case a vessel is lost, destroyed, seized, sold or abandoned, the crew is to be returned to a Pacific Coast port, and wages and bonus shall continue for each member of the deck department until arrival at home port.

14. If a seaman has been interned by any of the warring nations, pay shall continue while he is interned and he shall be paid until his return to the port of engagement in the United States.

15. On vessels carrying munitions and contraband into ports of belligerent nations, each member of the deck department shall receive 200% raise in wages.

16. On vessels entering ports in the West Indies controlled by a belligerent nation, such as the Ports of Trinidad, Barbados, Martinique, Jamaica and other ports, each member of the crew shall receive \$25.00 bonus.

Respectfully,

SAILORS' UNION OF THE
PACIFIC

By: Sgd HARRY LUNDEBERG
Secretary-Treasurer

HL-jm

RESPONDENT'S EXHIBIT J

National Marine Engineers' Beneficial Association
Affiliated with Standard Railway Labor
Organizations
313 Machinists' Building
9th Street and Mt. Vernon Place N.W.
Washington, D. C.

Oct. 24, 1941

Subject: War Bonus agreement.

Mr. Frank J. Taylor, President,
American Merchant Marine Institute,
11 Broadway
New York, N. Y.

Dear Mr. Taylor:

In checking over the August 16th War Risk agreement, and the supplementary agreement of Oct. 15th, entered into and signed by Mr. J. B. Bryan,

President of the Pacific-American Shipowners' Assn., and my representatives representing the M.E.B.A., namely, R. Meriwether, Harry Norman and William Peel, I find in the third paragraph on the third page of the August 16th agreement, this language:

“In the event the vessel be interned, destroyed or abandoned due to war-like operations and unable to continue her voyage, each licensed officer shall be paid wages, including Temporary Emergency Wages, to the date the licensed officers arrive in a Continental United States Port. Furthermore, in such event arrangement shall be made by the company for repatriation of such men to a Continental United States Port.”

I find on page 6, the same language in the supplementary agreement of the Pacific Coast, followed by this additional paragraph:

“While employees are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66 2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI.”

Now there is a difference of language existing in the two agreements, since the Pacific Coast supplementary agreement provides that while vessels are in the war zone areas, war bonuses shall be paid to them at the rate of 66 2/3% of their basic wage for Areas I to V, inclusive, and 25% for Area VI. I deem it advisable, since the August 16th agreement

was supposed to be national in scope, that the language of the agreement for the Atlantic, Gulf and Pacific Coasts should read alike, to avoid any confusion by the membership employed aboard the vessels receiving a higher rate on the Pacific Coast than on the East Coast.

I also note, in the Pacific Coast supplementary agreement, it provides for Area VI, 25% of the basic wage while vessels are north of 35°, north latitude, while the Maritime Commission and the Department of Labor, in setting up the inequities in those areas, have provided 27½% for Area VI.

I called this matter to the attention of my representative, Mr. R. Meriwether, by long distance phone on Thursday, so he could take it up with Mr. Bryan, Pres. of the Pacific American Shipowners Assn., for correction. My purpose in calling this to your attention is that I deem it advisable that we include that additional paragraph as it appears in the supplementary agreement of the Pacific Coast to the agreement of August 16, 1941.

I would appreciate hearing from you, as to what disposition you feel we should make of this matter.

I am,

Very truly yours,

(Signed) S. J. HOGAN

President

SJH/G

Copy to: Bryan, Delaney, King, Kirby, Hemphill, Meriwether.

The Court: Now, are there any other unadmitted exhibits? Exhibits A-6 to A-12, inclusive.

Mr. Ambler: And Exhibit K has been admitted.

The Court: Exhibit K has been admitted.

Mr. Ambler: And A-1 to A-12 have been admitted, as I understand it.

The Court: A-1 to A-4 have been admitted. A-5 to A-12 have not been admitted.

Mr. Ambler: I wish at this time to move their admission, or I would be perfectly willing for the Court to reserve the ruling.

The Court: I prefer to finally rule now upon the offer of all those exhibits which it is desired the Court consider.

Mr. Ambler: I now move the introduction in evidence of Respondent's Exhibits A-5 to A-12 inclusive, A-13 having already been ruled on adversely by your Honor.

The Court: Is there any further statement, Mr. Levinson?

Mr. Levinson: The same objection which I have heretofore made, your Honor.

The Court: I think the same reason applies to these that has applied to the others spoken of by the Court since the noon hour, and the objections are overruled, and Respondent's Exhibits A-5 to A-12 inclusive, and each and all of them, are now admitted.

Mr. Levinson: Allow an exception.

The Court: Allowed.

(Whereupon, Respondent's Exhibits A-5 to A-12 inclusive were received in evidence.)

RESPONDENT'S EXHIBIT A-5

Admitted Apr. 6, 1945

This Agreement dated October 10, 1941, by and between National Organization of Masters, Mates and Pilots of America, West Coast Local #90, (hereinafter called "the Organization"), and Pacific American Shipowners Association acting on behalf of the steamship companies the names of which are subscribed hereto (hereinafter called "the employers"),

Witnesseth:

Whereas on the 16th day of August, 1941, the parties hereto, together with the representatives of certain organizations of licensed officers and other employers entered into an agreement concerning the matters hereinafter set forth; and

Whereas in and by the terms of said agreement it was provided amongst other things that with respect to certain war risk areas therein defined the Department of Labor of the United States and the Maritime Commission would jointly examine all facts pertaining to the same at the expiration of thirty (30) days from the date thereof and if it were found that inequities existed detrimental to the Licensed officers members of the organizations signatory thereto as compared to other crafts, then joint recommendations would be made to correct such inequities; and

Whereas subsequent to said August 16, 1941, agreements have been entered into between Pacific American Shipowners Association and certain

unions of unlicensed employees relative to war risk areas and war risk policies, as a result of which it is agreed that inequities have arisen which the parties hereto desire to correct in the manner hereinafter provided;

Now, Therefore, it is hereby agreed as follows:

(1) This agreement shall become effective on all voyages shipping articles for which were entered into on or after August 16, 1941, and as to all such voyages and all subsequent voyages shall supersede said agreement of August 16, 1941, and shall continue in full force and effect as to each war risk area described herein until its abolition as may be anticipated upon cessation of hostilities between warring nations as proclaimed by the President of the United States or otherwise;

(2) War risk areas wherein war risk bonuses shall be paid licensed officers are set forth as follows:

Area I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland.

Area II. Trans-Atlantic voyages to Russia (Archangel, etc.).

Area III. Trans-Pacific voyages to Russia (Vladivostok, Petropavlosk).

Area IV. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula.

Area V. Trans-Pacific voyages to New Zealand or Australia.

Area VI. Canada (Atlantic Coast).

Subject to terms and conditions following, war bonuses shall be paid in the respective areas as above defined, as follows:

Area I. (a) $66\frac{2}{3}\%$ of basic wages for the entire voyage; \$100 for Suez or any other port which is subject to regular bombing, plus \$5 per day for each day beyond five days that the vessel is in that port; and

(b) \$45 for each port in the Red Sea and Persian Gulf not covered in Paragraph (a) supra.

Area II. $66\frac{2}{3}\%$ of basic wages for the entire voyage, and \$75 for each Russian port.

Area III. $66\frac{2}{3}\%$ of basic wages after crossing the 180th meridian, westbound, until recrossing the same meridian eastbound, and \$75 for each Russian port.

Area IV. $66\frac{2}{3}\%$ of basic wages from the crossing of the 180th meridian, westbound, until recrossing the same meridian eastbound.

Area V. $66\frac{2}{3}\%$ of basic wages from arrival of vessel in Suva or the crossing of the 180th meridian, westbound, until departure from Suva or crossing the 180th meridian eastbound.

Area VI. 25% of basic wages while vessel is north of 35 degrees of north latitude.

On round-the-world voyages, westward, $66\frac{2}{3}\%$ of the basic wages from the crossing of the 180th meridian westbound until arriving in a Continental United States East Coast or Gulf Coast port, or at the Panama Canal. If any vessel referred to in Area I continues eastbound to United States ports via India and the Pacific Ocean said bonus rates

for such area will continue until the vessel passes the 180th meridian, eastbound, and thereafter no further bonuses will be payable.

For adjustment in the above listed percentages upon which bonuses are paid an Index will be compiled by the Insurance Division of the United States Maritime Commission in cooperation and in conjunction with the Department of Labor and monthly reports will be furnished to all interested parties concerning deviations from such index as of the 15th day of each month. Such index will be based upon the fair average of war risk insurance rates paid on hulls of American flag vessels operating in all areas above described. The fair average of such rates as of the effective date of this agreement shall be listed as 100 and the corresponding percentage increases or decreases in that average shall be reflected on the Index. When the Index figures shall have reached 150 on the basis above described, which shall represent an increase of 50% in the fair average of the above described war risk insurance rates on the hulls of American flag vessels operating in the above described areas, then the war bonus percentages aforesaid shall automatically become 75%; and in a similar manner when the Index figures shall have reached 200, which shall represent a doubling of the fair average of said insurance rates, under the method above described, then the war bonus percentages shall advance from 75% to 100%.

When the percentage figures for the payment of war bonuses shall have reached 100% this will be

the maximum figure to be paid for war bonuses whether war is declared by or against the United States or whether the United States becomes an active participant in war, or not.

In the event that there is a recession in the figures of the above described index no reduction from 100% war bonus when reached shall be made until such time as the aforesaid Index figures shall have receded to 150 on the same basis as above described and at that time the recession from 100% war bonus being paid shall be to 75%. When the Index figures shall have receded to 100 then the war bonus percentage payment shall be 66 2/3%, below which, regardless of Index figures, the war bonus figure shall not recede, except as specifically provided for hereinafter.

The term "basic wages" hereinbefore referred to, are the monthly wage rates which prevail at the date hereof and specified in the agreement between the parties hereto dated Decembr 30, 1939; a computation setting forth the amounts which constitute 66 2/3% of said basic wages and 25% of said basic wages, respectively, is attached hereto and made a part of this agreement;

(3) In the event of loss of personal effects by any licensed officer, due to the necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, each licensed officer so affected shall be reimbursed by a sum not to exceed \$500;

(4) In the event a vessel is interned, destroyed or abandoned as a result of war operations and is

unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port.

While employees are in the war zone areas described herein war bonuses shall also be paid to them at the rate of $66\frac{2}{3}\%$ of the said basic wages in Areas I to V inclusive, and 25% in Area VI.

(5) War risk insurance of \$5,000 shall be furnished each Licensed Officer on voyages described in the above danger areas; such policy shall provide for the payment of the said sum of \$5,000 to the estate or designated beneficiary of such Licensed Officer in case of death due to war conditions or the payment of said sum to the Licensed Officer himself in the event of his total and permanent disability due to such war conditions, and shall provide for payment of any sum less than \$5,000 to which such Licensed Officer may be entitled for injury less than total or permanent disability resulting from said war conditions. Such policies

shall be made available for inspection at the offices of the respective companies.

NATIONAL ORGANIZATION
OF MASTERS, MATES AND
PILOTS OF AMERICA,
WEST COAST LOCAL #90

By (sgd) C. F. MAY

PACIFIC AMERICAN SHIP-
OWNERS ASSOCIATION

By (sgd) J. B. BRYAN

President

Acting on behalf of the steamship lines named
below:

RESPONDENT'S EXHIBIT A-6

Admitted Apr. 6, 1945

This Agreement dated October 15, 1941, by and between Marine Engineers' Beneficial Association (hereinafter called "the Association"), and Pacific American Shipowners Association acting on behalf of the steamship companies the names of which are subscribed hereto (hereinafter called "the employers"),

MARINE ENGINEERS' BENE-
FICIAL ASSOCIATION

By (sgd) R. MERIWETHER

PACIFIC AMERICAN SHIP-
OWNERS ASSOCIATION

By (sgd) J. B. BRYAN

RESPONDENT EXHIBIT A-7

Admitted Apr. 6, 1945

This Agreement dated October 16, 1941, by and between American Communications Association (Marine Division) (hereinafter called "the Association"), and Pacific American Shipowners Association acting on behalf of the steamship companies the names of which are subscribed hereto (hereinafter called "the employers"),

Witnesseth:

Whereas on the 16th day of September, 1941, the parties hereto, entered into an agreement concerning the matters hereinafter set forth; and

PACIFIC AMERICAN SHIP-
OWNERS ASSOCIATION

By (sgd) J. B. BRYAN

President

AMERICAN COMMUNICA-
TIONS ASSOCIATION,
Marine Division

By (sgd) GEO. F. B. KING

(sgd) P. A. T. HENDRIX

RESPONDENT EXHIBIT A-8

Admitted Apr. 6, 1945

This Agreement, dated October 9, 1941 by and between the Sailors' Union of the Pacific hereinafter referred to as the "Union" and the Pacific American Shipowners Association, a corporation, acting on behalf of the companies whose names are subscribed hereto,

Witnesseth:

Whereas, a collective bargaining contract between the parties dated October 10, 1939 specifically provided among other things for the establishment of bonuses and other special benefits on vessels going into war zones and during the existence of such contract a dispute arose between the parties concerning the war zones and bonuses payable therein which dispute was certified to the National Defense Mediation Board; and

Whereas, such contract expired on September 30, 1941 and the parties are now engaged in negotiations looking toward the making of a new collective bargaining contract; and

Whereas, the said National Defense Mediation Board did on October 4, 1941 publish recommendations for bonuses for war risk to apply during the period hereinafter specified and the parties hereto have accepted said recommendations;

Now, Therefore, It is agreed that the said recommendations of the National Defense Mediation Board are hereby accepted by the parties hereto and in pursuance thereof the parties do agree as follows:

(b) An able-bodied seaman shall be paid a war risk bonus at the rate of \$80 a month in the first four areas and \$33 in the fifth area. Other Unlicensed Personnel shall be paid the same bonus.

Dated: October 9, 1941

PACIFIC AMERICAN SHIP-
OWNERS ASSOCIATION

(sgd) J. B. BRYAN

President

SAILORS' UNION OF THE
PACIFIC

(sgd) HARRY LUNDEBERG

Secretary-Treasurer

RESPONDENT'S EXHIBIT No. A-9

Admitted April 6, 1945

Marine Firemen, Oilers, etc.

COMPUTATION OF COMPENSATION

Wages and Emergency Increase

General Agreement 10/7/40	Supplementary Agree- ment 2/10/41	Total Compen- tion Shipping	Compensation paid N.Y. Agreement
Basic Wages			
Oilers	Emergency Increase 17.50	Articles 100.00	10/10/41 110.00
Firemen	17.50	90.00	100.00
Messmen.....	Marine Cooks, etc. 17.50	77.50	Agreement 10/31/41 87.50

WAR BONUS

Marine Firemen, etc., Supple- mentary Agreement 5/19/41		Compensation paid N.Y. Agree- ment 10/9/41
Oilers.....	\$60. a month (\$2,000. war risk)	\$80. a month (\$5,000. war risk; \$100. attack bonus; repatriation; compen- sation internment
Firemen.....	" " "	" "
Messmen.....	Marine, Cooks, etc. " "	Agreement 10/10/41 " "

RESPONDENT'S EXHIBIT No. A-10

Admitted Apr. 6, 1945

MARITIME WAR EMERGENCY BOARD
DECISION NO. 2.

January 10, 1942.

The Maritime War Emergency Board announces today this Decision with respect to bonus areas and bonus payments for licensed and unlicensed personnel (employed on United States Flag vessels) of the American Merchant Marine.

Voyages are divided into six (6) classifications and are specified in Attachment No. 1.

Bonus rates in accordance with these classifications and port bonuses are specified in Attachment No. 2.

Attachment No. 3 is a memorandum giving sample methods of application of the bonus rate for voyages traversing waters as described in some of the different classifications.

In making this Decision the Board has given due consideration to the existing conditions at sea and in port, based upon the latest and best information available, and to existing collective bargaining agreements. As a result of authentic information of important changes or developments in war conditions, the Board may modify, extend or revoke any of the provisions of this Decision either on its own motion or after written petition and careful consideration of evidence presented by the parties affected.

All owners and operators of United States Flag vessels of the American Merchant Marine and all

licensed and unlicensed personnel employed on those vessels are expected to conform to this Decision.

The attachments are a part of the Maritime War Emergency Board's decision No. 2:

1. Classifications
2. Bonuses including port bonuses
3. Illustrations of classifications

The provisions of this Decision are retroactive to and including December 7, 1941.

WARNING

The Board Cautions Owners, Operators, Licensed and Unlicensed Personnel and Their Respective Bargaining Agents and All Others to Refrain from Distribution, Dissemination or Publication of the Information Contained, Included and Referred to Herein to Others Not Directly Concerned with the Payment of or the Application of Bonuses. Because of War Conditions This Important Warning Is Emphasized.

MARITIME WAR EMERGENCY
BOARD

EDWARD MACAULEY

Chairman

FRANK P. GRAHAM

JOHN R. STEELMAN

ATTACHMENT No. 1

MARITIME WAR EMERGENCY BOARD
DECISION No. 2

Classification I.

(a) Trans-Atlantic voyages between ports in the Atlantic or its dependent waters (including Balboa and the Panama Canal) and Iceland, Europe or the Mediterranean.

(b) Trans-Pacific voyages in waters east of 98° east longitude and voyages between Hawaiian Islands and Continental Pacific ports of the Western Hemisphere, including Balboa.

Classification II.

(a) Voyages between ports of the Western Hemisphere and Africa (other than the Mediterranean) or the Indian Ocean, Red Sea, Arabian Sea or the Bay of Bengal west of 98° east longitude, and voyages in said waters.

(b) Voyages between United States Pacific ports and Alaskan ports west of 140° west longitude.

Classification III.

(a) Voyages between United States ports and Greenland.

(b) Voyages between United States ports and South American Atlantic ports while south of the Equator and north of but not including Rio de Janeiro or the latitude thereof.

(c) Voyages between United States Pacific ports and Pacific Coast ports of Mexico, Central and South America, or Balboa, and voyages between

Balboa and Pacific ports of Mexico, Central and South America.

Classification IV.

Coastwise voyages between Pacific Coast ports of the United States, Canada and Alaska east of 140° west longitude.

Classification V.

(a) Voyages, other than voyages in Classifications I(a), II(a) and III(a) and portions of voyages in Classification VI(a), in waters of the Atlantic or its dependent waters north of the Equator and westward of a line from St. Johns, Newfoundland, to the intersection of 40° west longitude and the Equator, and including Christobal, Balboa, the Panama Canal and its eastern approaches.

(b) Voyages while along the east coast of South America south of and including Rio de Janeiro or the latitude thereof.

(c) Voyages from ports of the Gulf of Mexico as defined in Classification VI.

Classification VI.

(a) Voyages, other than voyages in Classifications I(a), II(a) and III(a), while in the Gulf of Mexico. The Gulf of Mexico, for the purposes hereof, includes all waters and ports west of a line drawn from the easternmost point of the city or Key West, or the approaches thereto, to the easternmost point of the city of Havana, or the approaches thereto, and thence along the north coast of Cuba to the westernmost point thereof and thence to the easternmost point of Yucatan.

(b) Voyages wholly within the Great Lakes; and on inland waters, harbors, rivers, sounds, bays and gulfs of the United States. Voyages between ports not south of New York nor north of Boston are included within this Classification when vessels proceed via Long Island Sound and do not proceed east of 70° west longitude.

ATTACHMENT No. 2

Bonus Rates in Accordance With Classifications

Percentages referred to below are the percentages of the total monthly rate of compensation including monthly special emergency compensation but excluding overtime, penalty time and all other extra compensations.

Classification I.

(a) and (b) 100% of the total monthly rate of compensation as defined above, but not less than \$100 per month in any case.

Classification II.

(a) 100% of the total monthly rate of compensation as defined above, but not less than \$100. per month in any case.

(b) 80% of the total monthly rate of compensation as defined above, but not less than \$80. per month in any case.

Classification III.

(a) 70% of the total monthly rate of compensation as defined above, but not less than \$70. per month in any case.

(b) and (c) 60% of the total monthly rate of compensation as defined above, but not less than \$60. per month in any case.

Classification IV.

40% of the total monthly rate of compensation as defined above, but not less than \$40. per month in any case.

Classification V.

(a), (b), (c) 35% of the total monthly rate of compensation as defined above, but not less than \$35. per month in any case.

Classification VI.

No bonus.

Port bonuses in the amount of \$125. will be paid for calls (wether at one or more ports or bases) in any of the following areas:

I.

- (a) Russian ports in the Arctic Ocean or White Sea.
- (b) United Kingdom.
- (c) Suez Canal, on entering southern entrance
- (d) Philippine Islands.
- (e) Singapore.
- (f) Borneo.
- (g) Sumatra.
- (h) Java.

Port bonuses in the amount of \$100 will be paid for calls (whether at one or more ports or bases) in any of the following areas:

II.

- (a) Rangoon.
- (b) North Ireland.
- (c) Eire.

Port bonuses in the amount of \$60. will be paid for calls (whether at one or more ports or bases) in any of the following areas:

III.

- (a) Iceland.
- (b) Persian Gulf.

Such port bonuses shall be paid for each area in which calls are made, but no more than one bonus shall be paid for any one area, irrespective of the number of calls in such area.

ATTACHMENT No. 3

MARITIME WAR EMERGENCY BOARD
DECISION No. 2

Memorandum

Except as expressly provided, bonuses are payable only while vessels are within the limits defined in their respective classes. Changes, whether upward or downward, in bonus rates during a voyage are effective at midnight following the crossing of the line demarking the new classification. Classifications shall be determined in accordance with the usual course followed on the voyages in question.

The Maritime War Emergency Board cites the following illustrations as examples in the interpretation of the application of bonus payments.

Example I. Voyage from New York to Valparaiso, Chile.

Bonus for Classification V(a) applies from the commencement of the voyage at New York until midnight of the day during which the vessel passes or departs from Balboa. From midnight of the day during which the vessel passes or departs from Balboa, bonus for Classification III(b) will become operative and remain operative during the voyage from Balboa to Valparaiso and returning to Balboa. Bonus for Classification III(b) ceases to be operative at midnight of the day during which the vessel passes or departs from Balboa north-bound on the homeward voyage and the bonus applicable to Classification V(a) becomes operative and continues until the termination of the voyage of the vessel at New York.

Example II. Voyage from San Francisco to Buenos Aires.

Bonus for Classification III(c) applies from commencement of the voyage at San Francisco until midnight of the day during which the vessel passes or departs from Balboa. From midnight of the day during which the vessel passes or departs from Balboa until midnight of the day during which the vessel crosses the equator the bonus for Classification V(a) is operative. From midnight of the day during which the vessel crosses the equator and until midnight of the day during which the vessel crosses the latitude of Rio de Janeiro the bonus applicable to Classification III(b) is operative. From midnight of the day during which the vessel crosses

the latitude of Rio de Janeiro and until her arrival in Buenos Aires, the bonus payments will become operative for the respective classifications in a similar manner.

Example 3. Voyage from Boston to Australia, via the Panama Canal.

Bonus for Classification V(a) applies from the commencement of the voyage at Boston until midnight of the day during which the vessel passes or departs from Balboa. From midnight of the day during which the vessel passes or departs from Balboa until her arrival in Australia bonus applicable to Classification I(b) is operative. On the homeward voyage via the Panama Canal the bonus payments will become operative for the respective classifications in a similar manner.

Example 4. Around the World Voyage, Trans-Pacific from San Francisco Touching New York and via the Panama Canal.

Bonus for Classification I(b) applies from the commencement of the voyage at San Francisco until midnight of the day during which the vessel crosses the 98th meridian of east longitude. From midnight following the day during which the vessel passes the 98th meridian of east longitude, bonus for Classification II(a) will become operative until the vessel reaches New York. From midnight of the day during which the vessel reaches New York, the bonus for Classification V(a) will be operative. From midnight of the day during which the vessel passes or departs from Balboa and until the vessel

completes its voyage at San Francisco, the bonus applicable to Classification III(c) will be operative.

Example 5. Voyage from New Orleans to Valparaiso.

No bonus applies from the commencement of the voyage at New Orleans until midnight of the day during which the vessel leaves the Gulf of Mexico (as defined in Classification VI(a)). Thereafter bonus for Classification V(a) applies until midnight of the day during which the vessel passes or departs from Balboa. From midnight of that day bonus for Classification III(b) will become operative and remain operative during the voyage from Balboa to Valparaiso and returning to Balboa, Bonus for Classification III(b) ceases to be operative at midnight of the day during which the vessel passes or departs from Balboa northbound on the homeward voyage; and bonus for Classification V(a) becomes operative until midnight of the day during which the vessel again enters the Gulf of Mexico. Thereafter, and until the termination of the voyage at New Orleans, no bonus applies.

(Classification VI (a).)

RESPONDENT'S EXHIBIT A-11

Admitted Apr. 6, 1945

MARITIME WAR EMERGENCY BOARD

Decision No. 5

REVISED

February 21, 1942

The Maritime War Emergency Board today announces the revision of Decision No. 5 with respect to payments to seamen employed on United States flag vessels of the American Merchant Marine while interned as a result of enemy action and until repatriation to continental United States.

The Board has ruled that this revised Decision is to be considered as a consolidation of Decision No. 5 which the Board announced on January 23, 1942, the Supplement to Decision No. 5 which the Board announced on February 6, 1942 and the further amendments to Decision No. 5 referred to below. The Board requests the signatories to the Statement of Principles, and all persons in possession of the previous issue of Decision No. 5 and the Supplement, to destroy the issue and the Supplement thereto.

This revised Decision sets forth the procedure whereby an owner or operator of a vessel in the American Merchant Marine which has been sunk or damaged by enemy action shall pay the dependents of seamen during internment or while in the course of repatriation such amounts as the seamen have voluntarily allotted.

The Board has given additional consideration to

the current war conditions at sea and to existing collective bargaining agreements prior to writing these revisions.

This revised Decision includes:

(a) the Supplement to Decision No. 5 which the Board announced on February 6, 1942, with respect to payment of wages in compliance with request of seamen interned by enemy action;

(b) an Amendment to Decision No. 5 which was approved on February 21st to clarify the scope of Article I of Decision No. 5:

(c) an Amendment to Decision No. 5 which was approved on February 21st which provides for the continuance of bonus in case of destruction of the vessel, through a new article designated as Article IV:

(d) an Amendment to Decision No. 5 which was approved on February 21st with respect to the statement in Decision No. 5 that the decision shall be retroactive to and including December 7, 1941.

This Decision is retroactive to December 7, 1941 in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's Articles entered into on or before January 23, 1942 in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942 in the case of payments provided for in Article 4 hereof, and February 21, 1942 with respect to payments provided for in Article 6 hereof, or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, or where the making of such payments

were expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements (1).

Article 1. In the event of either

(a) The internment of any or all of the personnel of any United States flag vessel of the American Merchant Marine, or

(b) the destruction or abandonment of such vessel resulting from (a) capture, seizure, arrest, restraint, detainment, condemnation, preemption, requisition or confiscation, or the consequences thereof, or of any attempt thereat by any country, government, or political body other than the United States of America or any State or political subdivision thereof or any government which is or may become party signatory of the "United Nations Pact" promulgated on or about January 2, 1942, (b) as a consequence of hostilities or war-like operations, either before or after the declaration of war, (as clarified February 21, 1942).

The Shipowner shall assume liability for payments as set forth in Articles 2 and 3 below.

Article 2. Under the circumstances set forth in Article I above, the shipowners shall assume liability for payment of basic wages and emergency wages at the rates provided for in the ship's Articles, or in the case of the Master, in his contract of employment, during the period in which payments as provided herein are to be made, to the Master, Officer, or member of the crew for the period from the date of the taking into custody of the personnel for the purposes of internment, or the

destruction or abandonment of the vessel, until and including the date the Master, Officer or Member of the crew arrives at a Continental United States port; Provided, That

A. From the total amount of such wages shall be deducted the total amount paid in accordance with Article 3 hereof.

B. In no event shall such payments continue beyond three months after the termination of the present war shall have been proclaimed by the President.

C. All benefits hereunder shall cease in the event of unreasonable refusal of the seamen to return to the Continental United States.

Article 3. Under the circumstances set forth in Article 1 above, the shipowner shall assume liability for payments to be made not less frequently than monthly to dependents, institutions or persons designated for the period from the date of the taking into custody of the personnel for the purposes of internment as certified to by the Maritime Commission, or of the destruction or abandonment of the vessel, whichever may occur first, until and including the date the Master, Officer or Member of the crew involved arrives at a Continental United States port, or until the elapse of three months after the termination of the present war shall have been proclaimed by the President, or until the unreasonable refusal of the seamen to return to the Continental United States, whichever shall first occur, as follows:—

A. If the Master, Officer or Member of the crew

shall have allotted a portion of his wages throughout the voyage to one or more dependents, institutions or persons specified in Section 10 of the Act of June 26, 1884, as amended, 46 U. S. C. 599 (hereinafter referred to as the "Allotment Act"), such portion of the wages shall be the measure of the shipowner's liability to such dependents, institutions or persons, and the shipowner shall have no other liability for payment of wages to dependents or other persons under this Article. Allotments to dependents not residing within Continental United States or its territories shall be payable subject to applicable provisions of law

B. If the Master, Officers or Member of crew shall not have allotted any portion of his wages as provided in sub-paragraph A hereof, but shall nevertheless have within the Continental United States or its territories one or more dependents specified in the Allotment Act, such percentage of the wages, of said Master, Officer or Member of crew shall be paid to such dependent or dependents as is provided for death payments to dependents of a similar degree of relationship under said Sec. 9 of the U. S. Longshoremen's and Harbor Workers' Compensation Act (Public 803 - 69th Congress.)

C. If the Master, Officer, or Member of the crew shall not have allotted any portion of his wages as provided in sub-paragraph A hereof and does not have within the Continental United States or its territories one or more dependents specified in the Allotment Act, or such allotment does not comprise the total amount of wages payable to him,

then such wages or the balance thereof remaining after the payment of allotments as provided in subparagraph A hereof, shall be deposited by the shipowner in trust for the Master, Officer, or Member of the crew, in a bank which is a member of the Federal Deposit Insurance Corporation, at intervals not less frequently than monthly.

D. In the event of the internment of any or all of the personnel of the vessel, or the destruction or abandonment of the vessel, where it is unknown if a Master, Officer or Member of the crew has lost his life, the shipowner (with the approval of the Maritime War Emergency Board upon application herefor filed not less than 30 days before the granting of such approval) shall have the option of declaring the seamen presumptively dead for the purposes hereof and of making payment of death benefits, and thereupon payment shall be made of the death benefits provided in accordance with the ruling of the Maritime War Emergency Board and further payments under this Article and Article 2 shall cease.

Article 4. The seamen shall have the right to agree with the shipowner that in the event of the seamen's internment the shipowner will make payments to such seamen on account of any wages due him over and above the sums, if any, payable under Article 3 hereof, through the medium of any governmental agency of the United States, including the American Red Cross. The shipowner shall be authorized to make such payment to such governmental agency upon being advised that it has in

hand the request of the seaman for a specific amount of money or for periodic payments of a specified amount of money. Details of the procedure, including the form of such request, shall be satisfactory to the governmental agency handling the transaction. (1)

Article 5. Either the seaman or the shipowner may require as a condition of employment that the contract of employment as evidenced by the ship's Articles, or other employment agreement be executed by the seaman and the shipowner so as to conform with the provisions of the preceding Articles hereof, Provided, That nothing herein shall be construed to prohibit the seaman from waiving the provisions of Article 3 in their entirety (2).

Article 6. Where such United States flag vessel is lost, war bonus shall continue at the rate which prevailed immediately before the time of loss until the seaman arrives at a port where he is no longer exposed to marine perils, whether due to war or non-war conditions. If during such period the seaman is taken into custody for purposes of internment, the internment provisions of Article 1 hereof shall govern. If internment does not follow the loss of a ship, the seaman shall receive no bonus while at a safe port awaiting repatriation. If he is repatriated in whole or in part by sea on some other vessel, then he shall receive, during such voyage, war bonus at the rate which would be received if his

own vessel were making the same voyage as the vessel on which he is being repatriated. (3)

MARITIME WAR EMER-
GENCY BOARD

(Signed) EDWARD MACAULEY

Edward Macauley, Chairman

(Signed) FRANK P. GRAHAM

Frank P. Graham

(Signed) JOHN R. STEELMAN

John R. Steelman

(1) added by supplement promulgated Feb. 6, 1942

(2) Article 4 redesignated Article 5 on February 6, 1942.

(3) added by amendment promulgated February 21, 1942.

RESPONDENT'S EXHIBIT A-12

Admitted Apr. 6, 1945

Maritime War Emergency Board
Department of Commerce Building
Washington

I, the duly appointed and acting Secretary of the Maritime War Emergency Board, do hereby certify that the attached Decision No. 5, dated January 23, 1942, Supplement to Decision No. 5, dated February 6, 1942, and Amendments to Decision No. 5, dated February 17, 1942, are true, full and correct copies of the originals of the same held in my custody. I further certify that there were no other

supplements or amendments to Decision No. 5 prior to the issuance of Decision No. 5, Revised, dated February 21, 1942, and that the attached are true copies of the original Decision No. 5 and all the Supplements and Amendments mentioned in said Decision No. 5, Revised.

Dated: June 6, 1944

ERICH NIELSEN

Erich Nielsen

Secretary

(Seal of Maritime War Emergency Board)

Maritime War Emergency Board

DECISION No. 5

January 23, 1942

The Maritime War Emergency Board today announces this Decision with respect to payments to seamen employed on United States flag vessels of the American Merchant Marine while interned as a result of enemy action and until repatriation to continental United States.

This Decision sets forth the procedure whereby an owner or operator of a vessel in the American Merchant Marine which has been sunk or damaged by enemy action, shall pay the dependents of seamen during internment or while in the course of repatriation such amounts as the seaman have voluntarily allotted.

In making this Decision the Board has given careful consideration to the current war conditions at sea and to existing collective bargaining agreements.

This Decision is retroactive to and including December 7, 1941.

Article 1. In the event of either

(1) the internment of any or all of the personnel of any United States flag vessel of the American Merchant Marine, or

(2) the destruction or abandonment of such vessel resulting from capture, seizure, arrest, restraint, detainment, condemnation, preemption, requisition or confiscation, or the consequences thereof, or of any attempt thereat as a consequence of hostilities or war-like operations, either before or after the declaration of war, by any country, government, or political body other than the United States of America or any State or political sub-division thereof or any government which is or may become party signatory of the "United Nations Pact" promulgated on or about January 2, 1942, the shipowner shall assume liability for payments as set forth in Articles 2 and 3 below.

Article 2. Under the circumstances set forth in Article 1 above, the shipowners shall assume liability for payment of basic wages and emergency wages at the rates provided for the the ship's Article, or, in the case of the Master, in his contract of employment, during the period in which payments as provided herein are to be made, to the Master, Officer, or Member of the crew for the period from the date of the taking into custody of the personnel for the purposes of internment, or the destruction or adabdonment of the vessel, until and including the date the Master, Officer or Member of

the crew arrives at a Continental United States port; Provided, That

A. From the total amount of such wages shall be deducted the total amount paid in accordance with Article 3 hereof.

B. In no event shall such payments continue beyond three months after the termination of the present war shall have been proclaimed by the President.

C. All benefits hereunder shall cease in the event of unreasonable refusal of the seaman to return to the Continental United States.

Article 3. Under the circumstances set forth in Article 1 above, the shipowner shall assume liability for payments to be made not less frequently than monthly to dependents, institutions or persons designated for the period from the date of the taking into custody of the personnel for purposes of internment as certified to by the Maritime Commission, or of the destruction or abandonment of the vessel, whichever may occur first, until and including the date the Master, Officer or Member of the crew involved arrives at a Continental United States port, or until the elapse of three months after the termination of the present war shall have been proclaimed by the President, or until the unreasonable refusal of the seaman to return to the Continental United States, whichever shall first occur, as follows:—

A. If the Master, Officer or Member of the crew shall have allotted a portion of his wages throughout the voyage to one or more dependents, institu-

tions or persons specified in Section 10 of the Act of June 26, 1884, as amended, 46 U.S.C. 599 (hereinafter referred to as the "Allotment Act"), such portion of the wages shall be the measure of the shipowner's liability to such dependents, institutions or persons, and the shipowner shall have no other liability for payment of wages to dependents or other persons under this Article. Allotments to dependents not residing within Continental United States or its territories shall be payable subject to applicable provisions of law.

B. If the Master, Officer or Member of crew shall not have allotted any portion of his wages as provided in sub-paragraph A hereof, but shall nevertheless have within the Continental United States or its territories one or more dependents specified in the Allotment Act, such percentage of the wages, of said Master, Officer or Member of Crew shall be paid to such dependent or dependents, as is provided for death payments to dependents of a similar degree of relationship under said Sec. 9 of the U. S. Longshoremen's and Harbor Workers' Compensation Act (Public 803—69th Congress).

C. If the Master, Officer, or Member of the crew shall not have allotted any portion of his wages as provided in sub-paragraph A hereof and does not have within the Continental United States or its territories one or more dependents specified in the Allotment Act, or such allotment does not comprise the total amount of wages payable to him, then such wages or the balance thereof remaining after the

payment of allotments as provided in sub-paragraph A hereof, shall be deposited by the shipowner in trust for the Master, Officer, or member of the crew, in a bank which is a member of the Federal Deposit Insurance Corporation, at intervals not less frequently than monthly.

D. In the event of the internment of any or all of the personnel of the vessel, or the destruction or abandonment of the vessel, where it is unknown if a Master, Officer or Member of the crew has lost his life, the shipowner (with the approval of the Maritime War Emergency Board upon application therefor filed not less than 30 days before the granting of such approval) shall have the option of declaring the seaman presumptively dead for the purposes hereof and of making payment of death benefits, and thereupon payment shall be made of the death benefits, provided in accordance with the ruling of the Maritime War Emergency Board and further payments under this Article and Article 2 shall cease.

Article 4. Either the seaman or the shipowner may require as a condition of employment that the contract of employment as evidenced by the ship's Articles or other employment agreement be executed by the seaman and the shipowner so as to conform with the provisions of the preceding Articles hereof, Provided, that nothing herein shall be construed to

prohibit the seaman from waiving the provisions of Article 3 in their entirety.

MARITIME WAR EMERGENCY
BOARD

(Sgd.) EDWARD MACAULEY

Edward Macauley

Chairman

(Sgd.) FRANK P. GRAHAM

Frank P. Graham

(Sgd.) JOHN R. STEELMAN

John R. Steelman

Maritime War Emergency Board

SUPPLEMENT TO DECISION No. 5

February 6, 1942

The Maritime War Emergency Board announces this Supplement to Decision No. 5 with respect to payment of wages or a part thereof in compliance with the request of seamen interned by enemy action.

The Board has ruled that Article 4 of Decision No. 5 be redesignated as Article 5 and be modified so as to insert immediately under Article 3, the following: "or Article 4, or both."

The decision is retroactive to and including December 7, 1941.

This supplement is as follows:

A seaman shall have the right to agree with the shipowner that in the event of the seaman's internment the shipowner will make payments to such seaman on account of any wages due him over and

above the sums, if any, payable under Article 3 hereof, though the medium of any governmental agency of the United States, including the American Red Cross. The shipowner shall be authorized to make such payment to such governmental agency upon being advised that it has in hand the request of the seaman for a specific amount of money or for periodic payments of a specific amount of money. Details of the procedure, including the form of such request, shall be satisfactory to the governmental agency handling the transaction.

MARITIME WAR EMERGENCY
BOARD

Signed: EDWARD MACAULEY

Edward Macauley,

Chairman

Signed: FRANK P. GRAHAM

Frank P. Graham

Signed: JOHN R. STEELMAN

John R. Steelman

Maritime War Emergency Board

February 17, 1942

AMENDMENTS TO DECISION No. 5

The Maritime War Emergency Board today announced the amendment of Decision No. 5 as follows:

1. In order to clarify the scope of Article 1 so that it clearly covers vessels in the American merchant marine which are sunk or damaged by enemy action, even though such vessels may not have been

subjected to capture or like events set forth in Article 1, said Article 1 of Decision No. 5 has been amended to read as follows:

“Article 1. In the event of either

(1) the internment of any or all of the personnel of any United States flag vessel of the American Merchant Marine,

or

(2) the destruction or abandonment of such vessel, resulting from (a) capture, seizure, arrest, restraint, detainment, condemnation, preemption, requisition or confiscation, or the consequences thereof, or of any attempt thereat by any country, government, or political body other than the United States of America or any state or political subdivision thereof or any government which is or may become party signatory of the “United States Pact” promulgated on or about January 2, 1942, or (b) the consequences of hostilities or warlike operations either before or after the declaration of war,

the shipowner shall assume liability for payments as set forth in Articles 2 and 3 below.”

2. The Board has given consideration to the continuance of bonus in the case of the destruction of the vessel, which subject was not covered by Decision No. 5, and, as a result, Decision No. 5 has been amended by inserting a new Article at the end thereof, designated Article 6 and reading as follows:

“Where such United States flag vessel is lost, war bonus shall continue at the rate which prevailed immediately before the time of loss until the seaman

arrives at a port where he is no longer exposed to marine perils, whether due to war or non-war conditions. If during such period the seaman is taken into custody for purposes of internment, the internment provisions of Article 1 hereof shall govern. If internment does not follow the loss of a ship, the seaman shall receive no bonus while at a safe port awaiting repatriation. If he is repatriated in whole or in part by sea on some other vessel, then he shall receive, during such voyage, war bonus at the rate which would be received if his own vessel were making the same voyage as the vessel on which he is being repatriated."

3. The Statement in Decision No. 5 that said Decision shall be retroactive to and including December 7, 1941, is amended to read as follows:

"This Decision is retroactive to December 7, 1941 in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's articles entered into on or before January 10, 1942 in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942 in the case of payments provided for in Article 4 hereof, and February . . . , 1942 with respect to payments provided for in Article 6 hereof, or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, or where the making of such payments was expressly left open as subject to later agree-

ment either in the ship's articles or such collective bargaining agreements."

Signed: EDWARD MACAULEY

Edward Macauley

Chairman

Signed: JOHN R. STEELMAN

John R. Steelman

Signed: FRANK P. GRAHAM

Frank P. Graham

The Court: I would now like to know if the Respondent rests.

Mr. Ambler: Yes, your Honor.

The Court: Very well. Do the Libelants rest?

Mr. Levinson: Yes, your Honor.

The Court: You may now proceed with your argument.

(Argument.)

Mr. Ambler: I might say, for the purpose of the record here, that on this matter of repatriation, the American Mail Line is anxious to pay all members of the crew of this vessel all that they are legally entitled to. I have the dates when this vessel and the preceding vessel left the Orient and brought back these men, and if it is your Honor's decision that they are entitled to bonus on the repatriation

voyage, I am perfectly willing to put those dates in, to stipulate those dates.

(Argument and Decision of the Court.)

(Whereupon, at 4:27 p.m., the Court was adjourned.)

[Endorsed]: Filed July 3, 1945.

[Endorsed]: No. 11100. United States Circuit Court of Appeals for the Ninth Circuit. Edward J. Steeves, Hugo Calgan, William A. Porter, and Samuel S. Taylor, Appellants, vs. American Mail Line, Ltd., a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 16, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

In Admiralty—No. 11100

EDWARD J. STEEVES, HUGO CALGAN, WIL-
LIAM A. PORTER and SAMUEL S.
TAYLOR,

Libelants-Appellants,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Respondent-Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF THE RECORD UPON WHICH
APPELLANTS INTEND TO RELY ON
THEIR APPEAL

1. Appellants hereby adopt the Assigns of Error filed herein as the Statement of Points relied upon upon their appeal.

2. Appellants hereby designate that portion of the record upon which they rely to be that set forth in the Stipulation of proctors filed herein and to be printed by the Clerk.

SAM L. LEVINSON

Proctor for Appellants.

Copy Received 7/18/45.

GROSSCUP, AMBLER &
STEPHENS

By GEN C. GROSSCUP

[Endorsed]: Filed July 23, 1945. Paul P.
O'Brien, Clerk.

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

SAM L. LEVINSON,
Proctor for Appellants.

1602 Northern Life Tower,
Seattle 1, Washington.

FILED

1945 2 4

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,

Appellants,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Appellee.

UPON. APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

SAM L. LEVINSON,

Proctor for Appellants.

1602 Northern Life Tower,
Seattle 1, Washington.

INDEX

	<i>Page</i>
Appendix.....	following page 59
Argument on the Assignments of Error.....	29
Conclusion	59
Specification of Error Relied Upon.....	25
Statement of the Case.....	2
Statement of Jurisdiction.....	1

TABLE OF CASES

<i>Ahlquist v. Alaska-Portland Packers' Ass'n.</i> , 39 F.(2d) 348	48
<i>Clark v. Claremont Apt. Hotel</i> , 19 Wn.(2d) 115, 141 P.(2d) 403.....	57
<i>Jansen v. Theodore Heinrich</i> , Federal Cases 7215..	46
<i>Jones v. United States</i> (D.C. Md.) 284 Fed. 721....	37
<i>Lokos v. Saliaris (The Leonidas)</i> 116 F.(2d) 440	36
<i>The Catalonia</i> (D.C. Va.) 236 Fed. 554.....	46
<i>The Disco</i> , Federal Cases 3922.....	46
<i>The Henry S. Grove</i> (D.C. Md.) 22 F.(2d) 444....	48
<i>The Herbert L. Rawding</i> (D.C. So. Caro.) 55 F. Supp. 156	36
<i>The Howick Hall</i> (D.C. La.) 10 F.(2d) 162.....	37
<i>The Jacob Luckenbach</i> (D.C. La.) 36 F.(2d) 381..	36
<i>The Louise</i> (D.C. Md.) 54 F. Supp. 157.....	36
<i>United States v. Westwood</i> (C.C.A. Va.) 266 Fed. 696	46
<i>Wope v. Hemmingway</i> , Federal Cases 18042.....	46

TEXTBOOKS

12 American Jurisprudence 751.....	32
12 American Jurisprudence 774.....	33
31 American Jurisprudence 874.....	47

STATUTES

28 U.S.C.A. 41 (3)	2
46 U.S.C.A. 564.....	37

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,

Appellants,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This is an appeal from the decree of the United States District Court for the Western District of Washington, Northern Division, sitting in Admiralty. This action was instituted by the filing of a libel in personam (Aps. 2) by Edward J. Steeves, Hugo Calgan, William A. Porter and Samuel S. Taylor, seamen on the SS Capillo, libelants, against the American Mail Line, a corporation, owners and operators of the

vessel, respondent. This action, of a maritime nature, is properly brought in the United States District Court (28 U.S.C.A. 41(3)). From a final decree (Aps. 50) awarding judgment to libelants in an amount less than that prayed for in the libel, an appeal lies to this court (28 U.S.C.A. 225, 227).

STATEMENT OF THE CASE

This is an action brought by four members of the crew of the S.S. Capillo, operated by the American Mail Line, Ltd., a corporation, to recover war bonus payments as provided in a rider attached to the shipping articles. The libelants seek bonus payments from December 29, 1941, when the vessel was destroyed by Japanese bombs, to December 7, 1943, when the libelants were returned to the United States after being imprisoned by the Japanese.

There are no disputed questions of fact, the parties having stipulated as to the facts (Aps. 81) as follows:

On October 11, 1941, the appellants signed articles as members of the crew of the SS Capillo for a voyage commencing on the Columbia River to Asiatic waters. The articles were in the usual form, designated the employment of each of the crew members and the rate of pay, and contained the following rider:

"The American Mail Line agrees to pay an emergency war bonus to the crew of the S.S. Capillo, Voyage Six (6), in accordance with the provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various Marine Unions.

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a United States port on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes.

"The company agrees to reimburse each man so affected by the amount of \$150.00 for each member of the crew, against the loss of personal effects as a result of war perils.

"It is further agreed that in the event of any increase in pay, overtime or war bonus or changes in insurance which may be granted, as the result of negotiations between Union and the Pacific American Shipowners' Association, the Company will be governed by the terms and effective date of any agreement so reached."

The ship left the Columbia River on October 17, 1941 (Aps. 156) proceeding to Manila, and crossed the 180th Meridian, westbound, on the 2nd day of November, 1941, and arrived in Manila on December 1, 1941. On December 29, 1941, the vessel was destroyed as the result of bombing by enemy planes, and all members of the crew, including the libelants, were interned and imprisoned by the Japanese.

Subsequently the libelants were exchanged as prisoners of war and were repatriated on the MS Grips-holm, arriving at New York, on December 1, 1943. Upon arrival the men were paid their wages during

the entire period up to the date of the arrival of the vessel. They were paid a war bonus from the time the vessel crossed the 180th Meridian, westbound, November 2, 1941, to the date the vessel was sunk in Manila Harbor, December 29, 1941. They were not paid any war bonus for any period during which they were interned or in prison camps, nor for any portion of the homeward voyage.

It was stipulated that if the libelants were entitled to recover, each is entitled to a bonus at the rate of \$80.00 per month. It was further stipulated if the libelants were entitled to transportation from New York to the Pacific Coast, the value of such transportation would be \$125.00.

Upon the statement of the foregoing facts and the entry of the stipulation, the appellants rested (Aps. 83), and the respondent introduced evidence in support of its case.

Respondent called A. R. Lintner, its vice-president and general manager, who testified that for several years prior to the summer of 1941 (Aps. 87-89), because of unsettled conditions, war and threats of war, the seagoing personnel were uneasy about the risks involved, and various maritime unions insisted upon certain compensation for these risks. The negotiations on this matter were conducted between the Maritime unions and individual companies. In the spring of 1941, these negotiations were instituted on an industry-wide basis, the Pacific American Shipowners Association acting for the vessel owners, including the respondent, and the various maritime unions appearing for the crew members (Aps. 90). The witness

identified respondent's Exhibit A-1, which was a statement of the amount paid to each of the libelants, which was admitted without objection (Aps. 97), and that there was no bonus paid for the period of internment. He did not see the rider involved until after the controversy arose. At the time the men signed on, the vessel was anxious to get a crew for the contemplated voyage (Aps. 102).

W. L. Williams, district manager of the respondent in the Columbia River District was called and testified and identified the shipping articles (Resp. Ex. A-2), which were admitted without objection (Aps. 105), and which contained the rider involved in the proceedings. He testified the rider was used upon the suggestion of the maritime unions at the time the respondent started to sign the crew (Aps. 110). At that time there were contracts in effect between the Pacific American Shipowners Association, representing the respondent, among others, and the unions, covering wages, hours and conditions which from time to time were subject to modification (Aps. 110). During the summer of 1941, negotiations were pending between the employers and the unions (Aps. 111) and there was considerable confusion within the industry concerning war bonus. At that time it was generally known that a supplemental agreement was being negotiated, principally to determine the payment of war bonus. The results of these pending negotiations were unknown to the witness, and the members of the crew at the time the articles in question were signed on October 11, 1941.

Williams identified the supplemental agreement,

dated October 9, 1941, between the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association and the Pacific American Steamship Owners Association (Ex. A-3), which was admitted without objection (Aps. 114). The libelants Steeves, Calgan and Porter, being firemen and watertenders on the vessel, were members of the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association.

The witness then identified respondent's Exhibit A-4, which was the Supplemental Agreement dated October 10, 1941, between the Marine Cooks & Stewards Association and the Pacific American Shipowners Association, which was also admitted without objection (Aps. 119). The libelant Taylor was a member of the Marine Cooks and Stewards Association. Exhibits A-3 and A-4 are the applicable supplemental agreements referred to in the first paragraph of rider in the articles.

Exhibit A-3 (Aps. 114), the firemen's agreement, defined five war risk zones, the fourth being a trans-Pacific voyage, and provided for the payment of a bonus at the rate of \$80.00 per month from the crossing of the 180th Meridian, westbound, until the crossing of the same meridian, eastbound. This agreement had no provisions concerning the payment of wages or bonus in the event of the loss of the vessel or internment or imprisonment of members of the crew, or for war risk insurance.

Exhibit A-4 (Aps. 199), the Marine Cooks and Stewards' agreement, while defining the same war risk zones and the same rates of compensation and war bonuses, provided in addition for a war risk in-

surance in the sum of \$5000.00 for the members of the crew. It also set forth that in the event of the loss of the vessel or its internment, the basic wages and emergency wages were to be paid to the members of the crew until their arrival at a continental United States port. War bonuses were to be paid while the employees were in the war zones defined in the agreement (Aps. 124).

Exhibit A-3 has no provision concerning its retroactive application, while Exhibit A-4, Par. 6, the Marine Cooks and Stewards agreement, provides that the agreement shall be effective on all voyages where shipping articles were entered into on or after August 16, 1941, or upon any voyage to which the provisions in the agreement are made applicable by special agreement or rider attached to the shipping articles (Aps. 124). Both agreements specifically refer to the proceedings before the National Defense Mediation Board and its published recommendations for bonuses for war risk and specifically adopt such recommendations, and in pursuance thereto entered into the specific arrangements set forth in the agreements. It is noted that the recommendations of themselves have no force and are only the basis of the actual agreement.

It was the contention of the appellants before the court, and it is here, that the rider in the shipping articles and the reference to the supplemental agreement to determine the *rate* of payment constituted the complete contract between the crew and the respondent, and the intention of the parties could be ascertained by these documents alone. It was the

position of the respondent at the trial below that the intention of the parties could not be ascertained from these agreements, and that it was necessary that all prior negotiations and contracts throughout the entire maritime industry on both coasts should be before the court in order to ascertain the meaning of the contract of employment between the libelants and the respondent, and that the libelants were thereby bound by subsequent modifications and changes in the agreement as determined by the later decisions of the Maritime War Emergency Board, which came into being after the articles were signed. All of these offers of evidence were objected to by the appellants.

While the trial court was originally of the opinion that the only question was the authority granted by the libelants to some agent for subsequent modification of the agreement (Aps. 94, 96), and was doubtful on the point of the admissibility of the documents and proffered evidence at the time they were offered, it reserved ruling thereon upon the statement of respondent's counsel he would show such authority (Aps. 96).

At the close of the case, the court was then of the opinion (Aps. 208) that the contract was "clouded with considerable obscurity and attended with intricate ramifications and unfamiliar conditions," and that the exhibits and proffered evidence shed light upon the subject, and admitted them all, with the exception of Exhibit A-13, pages from the Monthly Labor Review, published by the United States Department of Commerce, which discusses the matter of war bonus to sailors during the war (Aps. 139).

The documents and evidence admitted by the court over the objection of the appellants were as follows:

Respondent's Exhibit K (Aps. 199-206) was a document entitled "Statement of Principles," which was adopted at a conference of representatives of steamship companies and maritime unions held in Washington, D. C., on December 19, 1941, three weeks after the libelants had arrived in Manila and twelve days after the commencement of the war. This exhibit contained a preamble that it was desirable and necessary that a uniform basis of war bonus and insurance covering the entire maritime industry be reached, and that maritime labor would not strike during the war, and the steamship companies would have no lock-out. It further provided that all agreements and obligations arising out of collective bargaining agreements would in no way be violated, and set up machinery for the settlement of disputes without interruption of service or stoppage of work during the war. This machinery provided for the creation of a proposed Maritime War Emergency Board, and set forth its powers in Exhibit A attached to this Exhibit K.

Exhibit A to Exhibit K, dated the following day, December 18, 1941 (Aps. 200) provides that the unions and the vessel operators, having pledged themselves to cooperate in the war effort and to insure that questions that may arise which were likely to interrupt the war effort would be settled promptly, it was proposed that there should be established a board known as the Maritime War Emergency Board. When any difference should arise (Aps. 202) between any

steamship operator and any union representing its employees, and such question should not be settled through the ordinary procedure of collective bargaining, such question shall be referred to the Board by such steamship operator or union by giving written notice to the Board and to the other party, which shall specify the question to be referred to the Board. Upon the receipt of such notice, the Board shall give each party an opportunity to present evidence and argument, and thereafter render its decision (Aps. 203), which shall be final upon all parties to the difference out of which the question arose (Aps. 203). Attached to Exhibit K was a letter from the President, dated December 19, 1941, appointing the personnel of the Board (Aps. 205).

Respondent's Exhibit A-5 (Aps. 259 to 264) was the supplementary agreement dated October 10, 1941, between the Masters, Mates & Pilots Association, representing the licensed deck officers, and the Pacific American Shipowners Association. This agreement, while setting forth the bonus rates to be paid to the members of the union involved, was objected to on the ground of immateriality, as none of the libelants are members of this union.

Respondent's Exhibit A-6 is exactly the same in substance as Respondent's Exhibit A-5, except that this agreement bears date of October 15, 1941, and is between the Marine Engineers Beneficial Association, the licensed engine room officers, and the Pacific American Shipowners Association. For the foregoing reason it is stipulated (Aps. 73) that only the opening preamble, showing the date and the signatures

appear in the record (Aps. 265). The introduction of this exhibit was objected to on the ground of its immateriality because none of the libelants are members of the Marine Engineers Beneficial Association.

Respondent's Exhibit A-7 was an agreement dated October 16, 1941, between the American Communications Association, Marine Division (the radio operators) and the Pacific American Shipowners Association, and was the same as respondent's Exhibit A-5, except as to parties. The opening paragraph and signatures appear in the record (Aps. 266). The materiality of this agreement was challenged by the appellants because none of the libelants were members of the association involved.

Respondent's Exhibit A-8 is the same as respondent's Exhibit A-5, except that it is dated October 9, 1941, and is between the Sailors' Union of the Pacific and the Pacific American Shipowners Association, and has a different preamble describing the expiration of prior contracts (Aps. 267). Appellants objected to the introduction of this exhibit upon the ground that it was not material to any of the issues because none of the libelants were members of this union.

Respondent's Exhibit A-10 is a copy of the Maritime War Emergency Board Decision No. 2, issued in Washington, and dated January 10, 1942, twelve days after the vessel had been destroyed at Manila and the men had been interned. This exhibit (Aps. 270-279) and its attachments, set forth the classification of the six bonus areas and the rate of bonus applicable. It also made provision for the payment of certain port

bonus throughout the world and gave examples of the method of ascertaining the bonuses to be paid on the voyages set forth in the classification. Nothing appears in this exhibit concerning the payment of bonus during internment. Appellants objected to its materiality, but their objections were overruled.

While Exhibit A-11 precedes Exhibit A-12 in enumeration, Exhibit A-12 precedes Exhibit A-11 in dating, and we shall, therefore, first refer to Exhibit A-12:

Respondent's Exhibit A-12 (Aps. 287-297) is Maritime War Emergency Board Decision No. 5, dated February 17, 1942, issued at Washington, D. C., with supplements and amendments. Decision No. 5 sets forth the procedure whereby the owner or an operator of a vessel sunk by enemy action shall pay to the seaman, or his dependents, wages and allotments during the internment of the seaman. The supplement to Decision No. 5 provides that the decision is retroactive to December 7, 1941, and makes a further provision for the payment of wages to the seaman through the medium of the American Red Cross in the event of internment. The amendment to Decision No. 5, dated February 17, 1942, sets forth that the Board has now given consideration to the continuance of bonus in the case of the destruction of the vessel, which subject was not covered by Decision No. 5, and adds a number of provisions to Decision No. 5 covering this question, designating the same as Article No. 6, and provides for the payment of a war bonus at the rate which prevailed immediately before the loss of the vessel until the seaman arrives at a port where he is no

longer exposed to a marine peril; provides (Aps. 296) further that if internment does not follow the loss of a ship, the seaman shall receive no bonus while at a safe port awaiting repatriation. This exhibit provides, however, that its *provisions shall be retroactive to December 7, 1941, and shall be applicable only when there was no agreement with respect to the making of bonus payments provided for or contained in ship's articles entered into on or before February, 1942* (Aps. 296). Appellants objected to the introduction of this exhibit because of its immateriality in that it was issued subsequent to the signing of the articles and by the terms of the exhibit itself; in that the subject matter *was* covered by an agreement between the ship operators and the libelants. Also, by the terms of Exhibit A-11, Exhibit A-12 was superseded and had no force and effect.

Respondent's Exhibit No. A-11 was admitted in evidence and is set out in full (Aps. 280). This was Decision No. 5 Revised of the Maritime War Emergency Board, issued February 21, 1942, and sets forth in its preamble that it is to be considered as a consolidation of Decision No. 5, its supplements and amendments (heretofore referred to as Respondent's Exhibit A-12), with the request that all persons in possession of Decision No. 5 and supplement "destroy the issue and the supplement thereto." (Obviously the American Mail Line, Ltd., as one of the signatories to the Statement of Principles, did not follow this admonition of the Maritime War Emergency Board.)

This Revised Decision No. 5 set forth the new pro-

cedure whereby the operators of the vessel shall pay the dependents of seamen the amount of their allotment during the internment of the seaman and substantially follows the procedure set forth in Exhibit A-12 with reference to the payment of wages, providing similarly that the war bonus shall continue from the time of the loss of the vessel (Aps. 286) until the seaman arrives at a port where he is no longer exposed to marine perils, and further provides that if internment does not follow the loss of a ship, the seaman shall receive no bonus while at a safe port awaiting repatriation. The decision also provides that it is retroactive to December 7, 1941, *in all cases where there was no agreement with respect to the payments provided for or contained in the ship's articles entered into on or before January 23, 1942, with respect to the payment of bonus during internment, or where the making of such payment was expressly left open subject to a later agreement* either in the ship's articles or collective bargaining agreements (Aps. 281). The objection to the admission of this exhibit upon the ground of its immateriality because it was issued subsequent to the date of the signing of the articles, and because by the terms of the exhibit itself it was not applicable where the subject matter was covered by agreement between the libelants and the respondent was overruled. Exhibits A-5 to A-12 inclusive were all admitted over appellant's objection (Aps. 258).

The respondent also offered in evidence over the appellants' objection (Aps. 159) the testimony of William G. Mullins, which was taken by deposition

November 3, 1944, in New York. Mullins testified that he was the director of the Labor Relations Bureau of the American Merchant Marine Institute, a trade association composed of American steamship companies (Aps. 166). The respondent American Mail Line was not a member of this institute. Mullins testified concerning the negotiations on behalf of the members of his institute and the various maritime unions of the east coast (Aps. 163). None of the unions referred to had any connection with any of the appellants. He also testified concerning a conference which was called by the War Shipping Administration in Washington, D. C., to which were invited the various steamship owners associations of the United States, including the Pacific American Shipowners Association. An invitation was also extended to the unions representing the licensed personnel. The meeting was held in Washington on the 12th of August, 1941, which resulted in an agreement signed by the representatives of the licensed officers' unions present, The Masters, Mates and Pilots Association and Marine Engineers Beneficial Association and by the representatives of the steamship companies.

The demands made by the representatives of the licensed personnel to that conference were identified and offered in evidence as respondent's Exhibit A, and admitted over the objections of the appellants (Aps. 209). This exhibit was a written proposal submitted to the conference by the two unions representing the licensed personnel as to what they thought would be a fair and equitable compensation to be paid

for the various voyages into war waters, and what they felt should be carried by way of war risk insurance.

Respondent then offered in evidence Exhibit B, identified in the deposition of Mullins, which was an agreement between the licensed personnel unions and the shipowners, dated August 16, 1941 (Aps. 213), in which the various war areas were defined and the rate of compensation set forth, as well as the machinery for future adjustment. The agreement also provided for a reexamination of the facts at the expiration of thirty days from the date of its execution by the Department of Labor and the United States Maritime Commission, and if it was determined that inequities existed detrimental to the licensed officers as compared to the other groups employed on the vessel (the unlicensed personnel), joint recommendations would be made by the Department of Labor and the United States Maritime Commission for the correction of such inequities as were found to exist (Aps. 216). Exhibit B also included a copy of a letter from Admiral Land to Frank J. Taylor, President of the American Merchant Marine Institute, Inc., dated July 22, 1941 (Aps. 219), which constituted the formal invitation to the conference. The exhibit further included a form letter (Aps. 168) sent to individual steamship companies by Admiral Land, advising them of the conference and asking them to attend. The opening remarks of Commissioner McCauley at this conference were also deemed by the respondent to meet the requirement of the rules of relevancy and materiality to the issues involved in

this proceeding as to be offered as a part of this exhibit. Over the objection of the libelants that the entire exhibit had no relevancy whatever to the issues involved in this proceeding because they antedated the agreement which is the subject matter of the controversy, and further that these proceedings concerned unions to which the libelants owed no obligation whatever and could not and did not represent the libelants, the exhibit was admitted in evidence (Aps. 209).

The court also admitted in evidence respondent's Exhibit A (Aps. 223). The witness Mullins identified this exhibit as a circular letter (Aps. 169) dated August 18, 1941, addressed to all of the members of the American Merchant Marine Institute (with which the respondent had no connection), advising them of the results of the meetings with the Masters, Mates & Pilots Association and the Marine Engineers Beneficial Association, and of the negotiations and agreements entered into between these associations and the American Merchant Marine Institute. The appellants' objections to the relevancy and materiality of this exhibit were overruled (Aps. 209).

Mullins further testified concerning the last paragraph of Exhibit C, in which it is stated that the conferences would continue, beginning August 19th, 1941, for the unlicensed personnel. At that time the representatives of the Seafarers' International Union (which does not represent any of the appellants), expressed themselves as dissatisfied with the kind of agreement entered into on August 16, 1941, and of their desire to negotiate separately with the companies with whom they had collective bargaining

agreements (Aps. 170), and that subsequent negotiations did take place.

Mullins further testified (Aps. 170) that on September 22, 1941, another conference was called by telegraphic request from Admiral Land to Mr. F. A. Taylor, President of the Institute (Aps. 171). Apparently it was never held. Shortly after the receipt of the telegram calling the conference, a dispute between the Seafarers International Union and the companies with which it was negotiating was certified to the National Defense Mediation Board. (The respondent American Mail Line was not one of the companies.) A hearing was had by the Board on this certification and the decision was handed down, identified as Decision No. 80, and offered in evidence in this proceeding as respondent's Exhibit D (Aps. 172) and admitted by the court (Aps. 209).

Respondent's Exhibit D was a copy of the decision of the National Defense Mediation Board (Aps. 226) and followed hearings which were held September 29 and October 1, 2, 3, and 4, 1941. The date which this decision was handed down does not appear in the record. This decision set forth certain recommended bonus rates for defined war areas. Mr. Mullins further testified (Aps. 172) that the copy offered in evidence was not a true copy in that it did not contain a statement on the original in his file that the representatives of the shipowners agreed to urge those whom they represented to accept these recommendations, and that the representatives of the Sailors Union of the Pacific agreed to urge those that they represented to accept its recommendations, and the representa-

tives of th Seafarers International Union, though not fully in accord with the recommendations, agreed to carry them back to the union membership and explain to them why they should accept it (Aps. 173).

Respondent's Exhibit "D" also contained the provision (Aps. 231) that nothing in the recommendations should be so interpreted as to reduce benefits now existing under collective bargaining contracts. There is not a word in this exhibit relating to the payment of war bonus during internment. Appellants' challenge that this exhibit had absolutely no materiality or relevancy and did not concern any of the parties to this case at bar was overruled and the exhibit was admitted (Aps. 209).

Mullins further testified (Aps. 174) that commencing in September, 1941, the Institute, on behalf of some 23 or 24 of its member companies (in which the respondent was not represented) was in negotiation with the National Maritime Union for the renewal of current collective bargaining agreements. (The National Maritime Union, an east coast union, is a bitter opponent of the west coast unions). These negotiations culminated in an agreement dated November 6, 1941, after the vessel on which the libelants were employed had been at sea for some nineteen days. This resulted in the development of a standard form of contract signed by all of the member companies of the institute which had recognized the NMU as the agent for collective bargaining for their unlicensed personnel (Aps. 175).

This standard form of contract was identified as respondent's Exhibit E (Aps. 231), and although the

appellants again objected concerning the relevancy of this document signed after the rider to the articles in question, and between parties who had no connection with any of the parties interested in this litigation, the objection was overruled and the document was admitted (Aps. 209).

Mullins further testified that there was a further supplemental agreement entered into between the National Maritime Union and various companies, members of the Institute, which was negotiated on December 2, 1941, relating to bonus for a voyage to Russia (Aps. 176). This exhibit is in blank form and set out on page 236 of the Apostles on Appeal, and was identified as respondent's Exhibit F, and despite continued objections by appellants concerning its materiality and relevancy the same was admitted in evidence by the courts (Aps. 209).

Under questioning by counsel for respondent, Mullins testified that the National Maritime Union agreements remained in effect until the establishment of the first Maritime War Emergency Board. Respondent's Exhibit B (Aps. 176), the agreement with the licensed officers, was subsequently superseded by the agreements heretofore referred to as Exhibits A-5 and A-6, although Mullin testified there was no other agreement (Aps. 178), only some recommendations by the commission.

Mullins also testified concerning the negotiations between his Institute and the American Communications Association, which never materialized in a contract (Aps. 178) until after the matter was referred

to an arbitrator named by the United States Department of Labor (Aps. 179) in February, 1942.

This witness also brought out the fact that the NMU is a union which represents all departments of unlicensed personnel on the vessels on the Atlantic coast (Aps. 180), and although the Seafarers International Union represented some of the unlicensed personnel, no agreement existed between the American Merchant Marine Institute and the Seafarers International Union covering war bonus in the fall of 1941.

The witness Mullins discussed the exhibits heretofore identified in his deposition (Aps. 181) and brought out the fact that there were some differences in some of the contracts prior to the fall of 1941 (Aps. 181) concerning payment of bonus during internment and the contracts were not standardized as far as the Atlantic and the Gulf were concerned for the licensed personnel until August, 1941, and for the unlicensed personnel until November and December, 1941. He thought that his association and negotiations set the pattern, generally speaking, for the labor agreements on the Atlantic and Pacific Coast (Aps. 182), and testified concerning his meaning of the words emergency compensation and war bonus (Aps. 184, 185). Appellants objected to all of the testimony of the witness Mullins, which objection was overruled and the court admitted this testimony (Aps. 159).

J. B. Bryan testified on behalf of respondent in the form of answers to written interrogatories to which the appellants objected (Aps. 159) upon the

ground the questions and answers were not material. His testimony was that the Pacific American Shipowners Association of which he was president was formed in 1936, and acted in labor relation matters with seafaring unions; that commencing in 1939 collective bargaining agreements contained certain war bonus provisions; that confusion arose because of separate agreements entered into by various companies and rivalry between Pacific and Atlantic unions (Aps. 189), resulting in a series of conferences held in Washington, D. C., where uniform agreement for licensed and unlicensed personnel was entered into.

The witness Bryan participated in these negotiations. He identified written demands made by two unions, Exhibit G (Aps. 242). He also identified and testified to counter-proposals, dated August 12, 1941, made by the Pacific American Shipowners Association and the American Merchants Marine Institute to the demands of the two unions representing the licensed personnel. This exhibit was admitted in evidence over libelants' objection (Aps. 241).

The Pacific Coast Marine Firemen, Oilers & Waretenders Association also made a proposal as to what they considered fair on the question of war bonus, and this proposal was dated September 15, 1941 (Aps. 244), and this proposal was identified as respondent's exhibit H, and admitted over libelants' objection. The witness Bryan also identified respondent's Exhibit I (Aps. 250), which was the proposal submitted by the Sailors Union of the Pacific, dated September 16, 1941, supported by the reasons which that organization felt should prevail. This was also

admitted (Aps. 241) over appellants' objections as to the materiality. Finally, he identified respondent's Exhibit J (Aps. 255), which was a letter written by S. J. Hogan, president of the National Marine Engineers' Beneficial Association, under date of October 24, 1941, directed to Frank J. Taylor, President of the American Merchant Marine Institute and calling Mr. Taylor's attention to the fact that the August 16, 1941, war risk agreement with his organization, entered into on the Pacific Coast, and the supplemental agreement (A-6) were not alike. Although the appellants had great difficulty in seeing the materiality of such a document to the issues involved in the case at bar, and called the same to the court's attention by appropriate objection, it was admitted in evidence (Aps. 241).

The witness Bryan also identified the same documents testified to by the witness Mullins in his deposition, the demands made by the Radio Operators Association, the demands made by the Sailors Union of the Pacific, and the hearing in Case No. 80 before the National Defense Mediation Board, which hearing was held in October, 1941. He identified the dates upon which the supplementary agreements were entered into between the Pacific Shipowners Association and the six unions representing the sea-going personnel (Respondent's Exhibits A-3, A-4, A-5, A-6, A-7 and A-8). He was also interrogated concerning certain communications between his association and the American Merchant Marine Institute concerning the language in the contracts and fortunately, from the standpoint of the record, could testify to no other

communications other than Exhibit J, which had theretofore been introduced.

This witness also testified that there had never been any protest to his knowledge (Aps. 198) from either his association, the American Merchant Marine Institute, or any of the six Pacific Coast maritime unions to the Maritime War Emergency Board protesting or criticizing the action of the Board in adopting the rule laid down in Article 6 of Decision No. 5, Revised, of Maritime War Emergency Board, dated February 21, 1942, limiting the period of the payment of war bonus. This was introduced by the respondent apparently to show that there was no protest by the appellants, who at the time the decision was announced, had already been prisoners of the Japanese in some prison camp in the Orient for approximately two months and remained such prisoners until repatriated.

The Court announced its decision (Aps. 32) that it could not ascertain the intention of the parties without reference to all of the evidence admitted, and concluded that because the unions to which the libelants were members approved the Statement of Principles (Resp. Ex. K), that the action of the unions in subscribing to this Statement of Principles constituted libelants' consent to be bound by the decision of the Maritime War Emergency Board, and therefore followed the rulings of that board in not allowing a war bonus during internment, despite the provision of the shipping articles. Findings of fact and decree in accordance with the decision was entered. This appeal followed.

SPECIFICATIONS OF ERROR RELIED UPON

The cause of action set forth in the libel is based on written shipping articles executed October 11, 1941, between respondent and appellants. The articles contain a rider which provides for the payment of war bonus in accordance with the applicable supplementary agreements, during internment of the crew. Three of the appellants being members of the Pacific Coast Firemen, Oilers, Watertenders & Wipers Association, the applicable supplemental agreement is Exhibit A-3, dated October 9, 1941. The remaining appellant, being a member of the Pacific Coast Marine Cooks and Stewards Association, the applicable supplemental agreement is Exhibit A-4, dated October 10, 1941. By these supplemental agreements the bonus rate is \$80.00 per month.

Evidence of negotiations, conferences and agreements prior to October 11, 1941, are merged into the agreement and are not admissible. Evidence of negotiations, conferences, and agreements, occurring subsequent to October 11, 1941, between unions, of which none of the appellants are members, and ship-owners associations of which respondent is not a member, and decisions of administrative boards and tribunals formed after December 7, 1941, with quasi-judicial powers, are not admissible in this proceeding, and are not binding on appellants.

Findings of Fact, Conclusions of Law and the Decree based upon such improper evidence are erroneous. As all of the assigned errors are based upon the admission of evidence over the objection that such evidence is not material or relevant to the issues, and

the findings of fact made in accordance therewith, appellants will discuss them all under one heading.

The specified Assignments of Error relied upon by appellants appear in the record as follows:

Assignments of Error 1 to 10, inclusive (Aps. 54, 55), relating to Findings of Fact III to XII, inclusive (Aps. 37-40).

Assignment of Error 11 (Aps. 55) relating to Conclusions of Law I, II and III (Aps. 49).

Assignments of Error 12 and 13 (Aps. 56) relating to the entry of the Decree (Aps. 50).

Assignment of Error 14 (Aps. 56) relating to the admission, over appellants' objection, of Respondent's Exhibit K (Aps. 199).

Assignment of Error 15 (Aps. 58) relating to the admission, over appellants' objection, of Respondent's Exhibit A-5 (Aps. 259).

Assignment of Error 16 (Aps. 58) relating to the admission, over appellants' objection, of Respondent's Exhibit A-6 (Aps. 265).

Assignment of Error 17 (Aps. 59) relating to the admission, over appellants' objection, of Respondent's Exhibit A-7 (Aps. 266).

Assignment of Error 18 (Aps. 59) relating to the admission, over appellants' objection, of Respondent's Exhibit A-8 (Aps. 266).

Assignment of Error 19 (Aps. 59) relating to the admission, over appellants' objection, of Respondent's Exhibit A-10 (Aps. 270).

Assignment of Error 20 (Aps. 60) relating to the

admission, over appellants' objection, of Respondent's Exhibit A-11 (Aps. 279).

Assignment of Error 21 (Aps. 61) relating to the admission, over appellants' objection, of Respondent's Exhibit A-12 (Aps. 287).

Assignment of Error 22 (Aps. 62) relating to the admission over appellants' objection, of Exhibit "A," Mullins Deposition (Aps. 209).

Assignment of Error 23 (Aps. 63) relating to the admission over appellants' objection, of Exhibit "B," Mullins Deposition (Aps. 213).

Assignment of Error 24 (Aps. 63) relating to the admission, over appellants' objection, of Exhibit "C," Mullins Deposition (Aps. 223).

Assignment of Error 25 (Aps. 64) relating to the admission, over appellants' objection, of Exhibit "D," Mullins Deposition (Aps. 226).

Assignment of Error 26 (Aps. 66) relating to the admission, over appellants' objection, of Exhibit "E," Mullins Deposition (Aps. 231).

Assignment of Error 27 (Aps. 66) relating to the admission, over appellants' objection, of Exhibit "F," Mullins Deposition (Aps. 236).

Assignment of Error 29 (Aps. 67) relating to the admission, over appellants' objection, of Exhibit "G," Bryan Deposition (Aps. 242).

Assignment of Error 30 (Aps. 67) relating to the admission, over appellants' objection, of Exhibit "H," Bryan Deposition (Aps. 244).

Assignment of Error 31 (Aps. 68) relating to the

admission, over appellants' objection, of Exhibit "I," Bryan Deposition (Aps. 250).

Assignment of Error 32 (Aps. 68) relating to the admission, over appellants' objection, of Exhibit "J," Bryan Deposition (Aps. 255).

Assignment of Error 33 (Aps. 69) relating to the admission, over appellants' objection of the testimony of the witness Mullins (Aps. 160-187).

Assignment of Error 34 (Aps. 69) relating to the admission, over appellants' objection, of the testimony of the witness Bryan (Aps. 187-198).

The Assignments of Error relied upon are set forth in full in the Appendix to this brief.

ARGUMENT ON THE ASSIGNMENTS OF ERROR

The cause of action set forth in the libel is based on written shipping articles executed October 11, 1941, between respondent and libelants. The articles contain a rider which provides for the payment of war bonus in accordance with the applicable supplementary agreements during internment. Three of the appellants, being members of the Pacific Coast Firemen, Oilers, Watertenders & Wipers Association, the applicable supplemental agreement is Exhibit A-3, dated October 9, 1941. The remaining appellant, being a member of the Pacific Coast Marine Cooks & Stewards Association, the applicable supplemental agreement is Exhibit A-4, dated October 10, 1941. By the terms of these supplemental agreements, the bonus rate is \$80.00 per month. Evidence of negotiations, conferences and agreements prior to October 11, 1941, are merged into the agreement and are not admissible. Evidence of negotiations, conferences, and agreements, occurring subsequent to October 11, 1941, between unions, of which none of the appellants are members, and shipowners associations of which respondent is not a member, and decisions of administrative boards and tribunals formed after December 7, 1941, with quasi-judicial powers, are not admissible in this proceedings, and are not binding on appellants. Findings of fact, conclusions of law and the decree based upon such improper evidence are erroneous.

In the case at bar there are no disputed questions of fact. The libel is a simple action on a contract of employment as evidenced by the shipping articles and the attached rider. The rider, agreed to by respondent and the members of the crew, including the appel-

lants, men of ordinary intelligence, provides (1) for the payment of a war bonus, and reads as follows:

"The American Mail Line agrees to pay an emergency war bonus to the crew of the SS CAPILLO, Voyage Six (6), in accordance with the provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various Marine Unions.",

(2) the possibility of internment or imprisonment as a result of war, and for payment in the event of such contingency and the length of the payment as follows:

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay *wages and bonus* to the date members of the crew arrive in an United States port, on the Pacific Coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port on the Pacific Coast. Also that the company be liable for any injuries suffered by any crew member due to war causes." (*Italics supplied*)

The vessel and the crew knew that there were pending negotiations where the question of increase of compensation and war bonus might be considered, and so they covered that by providing:

"It is further agreed that in the event of any *increase in pay, overtime or war bonus* or changes in insurance which may be granted, as the result of negotiations between Union and the Pacific American Shipowners' Association, the Company will be governed by the terms and ef-

fective date of any agreement so reached." (*Italics supplied*)

Thus it appears that the only place where the rider is not complete is that portion which relates to the amount of the bonus or the rate at which it is to be paid. In order to determine that, the parties to this agreement referred to the applicable supplemental agreements which were in effect or about to go into effect at that time between unions representing the men and the Pacific American Shipowners' Association. The one covering the three appellants who were members of the engine room crew is Respondent's Exhibit A-3, dated October 9, 1941, between the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and the Pacific American Shipowners Association. The one covering the other appellant is Respondent's Exhibit A-4, which is the agreement between the Pacific Coast Marine Cooks & Stewards Association and the Pacific American Shipowners Association, dated October 10, 1941.

In the agreement between the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association and the Pacific American Shipowners Association (Ex. A-3, Aps. 114) the union adopts and makes effective certain recommendations of the National Defense Mediation Board, and agrees on the establishment of five war risk zones, and provides for a war risk bonus at the rate of \$80.00 per month on four of these zones, which includes the voyage in question. This supplemental agreement is silent on any question of internment or destruction of the ship due to war causes. This agreement applies to the appellants

Steeves, Calgan and Porter, who were members of the engine room department.

Exhibit A-4, the agreement between the Pacific Coast Marine Cooks & Stewards Union and the Pacific American Shipowners Association, was dated October 10, 1941, and sets forth the same areas and rate of bonus as in Exhibit A-3. However, this agreement has additional provisions which set forth the machinery relating to future adjustments, provides for the carrying of war risk insurance in the sum of \$5000.00, and specifically provides for the payment of a war bonus in the event of internment or destruction of the vessel while the employees are in the war zones defined.

It is, therefore, apparent that these two agreements supply the missing data in the articles, that is, the rate of bonus. While Exhibit A-4 affecting one appellant goes further and makes provision for the payment of war bonuses in the event of internment, it is apparent that the parties, having definitely agreed in writing in the rider on the length of time war bonus would be paid in the event of internment, did not intend to vary this portion of the agreement by the incorporation of contrary or other provisions in the supplemental agreements.

“A written instrument must ordinarily be interpreted to mean what on its face it purports to mean, unless some good reason can be assigned to show that the words used should be understood in a different sense.”

12 Am. Jur. 751.

“Where a contract as a whole discloses a given

intention, they will be interpreted, if possible, so as to be consistent with the general intent."

12 Am. Jur. 774.

The foregoing statements support the fundamental rule that when the parties to an agreement have contracted with reference to a particular situation, the length of time for payment of the war bonus, a reference to another document for another purpose will not defeat such intention.

While it will be admitted that it may be possible to raise some argument on the Marine Cooks & Stewards agreement covering the appellant Taylor in that there was provision both in the rider and the supplementary agreement relating to the length of time that war bonus is paid. common experience would indicate that this could not have been the intent of the men in the light of the specific provision in the rider which was known to them when they signed and when the terms of the supplementary agreement were then as yet unknown.

This is particularly true when it is borne in mind that the issues presented in this case are not between the unions as such and the Pacific American Ship-owners Association or its representative, but the issues here are between the four members of the crew of the SS CAPILLO and the respondent operator of the vessel. It was the men who had agreed upon the length of time for which the bonus would be paid in the event of internment and that was until the men returned to the Pacific Coast. They had not, however, as yet agreed on the rate, and therefore it was

necessary that they refer to the supplemental agreement to determine the rate.

Here then we have the completed contract. The contract fixed the compensation to be paid for the considered risk arising out of a voyage into war zones and the length of time such compensation was to be paid in the event of a materialization of the hazard, the destruction of the vessel and imprisonment of the crew. The men sailed, leaving the haven of the Pacific Coast waters on October 21, 1941. The men faithfully carried out their duties without complaint and brought the vessel and its cargo into waters which they had good cause to believe, before sailing, would be dangerous and hazardous. They had contracted to do so, and that was all there was to it.

The calculated risk which all parties considered materialized. The ship was attacked, destroyed and the crew was captured by the enemy, and they were imprisoned on December 29, 1941. They became prisoners of war, all normal communication with home was cut off, and the men took what comfort they could while suffering imprisonment from the knowledge and belief that upon their return to the Pacific Coast of the United States, whenever that might be, they would be paid not only their wages for operating the vessel, but the additional compensation of wages and war bonus as partial compensation for the hazards, the suffering and the anguish during long months of imprisonment. These were hazards which the men were not required to assume, and assumed only because the respondent was anxious to secure a crew for this voyage (Lintner, Aps. 102), and to send

the vessel and its cargo into these waters for the payment of such war freight rates as the conditions demanded. These men had no way of knowing that any changes were made or would be made in what they believed would be their pay when they returned to the United States.

Finally came the great day of repatriation, after many heart-breaking delays and postponements, and then when they are at last returned to the soil of the United States, they are met at the dock by a representative of the steamship company for the purpose of payment, and then for the first time they are advised that they will receive their wages while on the vessel and during such time as they were in prison, but that their war bonus, which each libelant believed the respondent had agreed to pay, would not be paid.

The respondent, remaining adamant in its position concerning the payment of war bonus during the period of internment, there was no other alternative but to bring an action on the contract.

Although throughout this discussion the payment has been referred to as 'war bonus,' it is nevertheless wages for services performed under extraordinary conditions and must be treated as such.

"War bonuses" are additional wages paid to the crew members to induce them to accept employment. Such bonuses are treated as wages, and are supported by a valid consideration.

"There can be no question but that the 'so-called' war bonus was additional wages for extra hazardous service. It was awarded as a result of a demand for increased wages, and was paid

for services rendered, and for nothing else. To call a portion of such wages a 'war bonus' does not alter its essential character."

Lokos v. Saliaris (The Leonidas) (C.C.A. 2) 116 F.(2d) 440, 442.

The added risk assumed is a valid consideration. If the vessel becomes unseaworthy during the voyage, a contract for a bonus to induce the seaman to assume the added risk, instead of taking his discharge, rests on a good consideration.

The Jacob Luckenbach (Dt. Ct. La.) 36 F. (2d) 381.

The steamship company agreement to pay crew members extra wages for sailing a vessel from Hampton Roads, to which it returned after leaving the convoy because of unseaworthiness, was valid.

The Louise (D.C. Maryland) 54 F. Supp. 157.

Where the crew signed on a vessel under a 100% bonus arrangement for a trans-Atlantic voyage, and the voyage terminated at South Carolina because of the condition of the vessel, it was held that the seamen were, nevertheless, entitled to their double wages.

The Herbert L. Rawding (D.C. So. Car.) 55 F. Supp. 156, 161.

Despite the attempt of the respondent to treat the war bonus as something other than wages, as a "bonus" or gratuity, it is apparent even from the cross-examination of the witness Mullins (Aps. 186) that the payment of these war bonuses was compensation for the risk which the men assumed by reason of the war hazard.

The position of respondent admits to an attempt to reduce the wages by the incorporation of other agreements. Such attempt is contrary to the statutory provision relating to shipping articles which require that the rate of wages be set forth at the time the men sign on.

46 U.S.C.A. 564.

In interpreting this section of the statute, it has been held that a provision of the shipping articles providing that the wages named were subject to change in accordance with a new schedule to be adopted by the shipowners was held to be invalid as not complying with the statute requiring the articles to state the wages to be paid.

Jones v. United States (D.C. Md.) 284 Fed. 721.

It has also been held that the provision of shipping articles, making any change in working rules or wages retroactive, to be applicable only to the agreement to which the seamen were actually or constructively parties, and not to an arbitrary reduction of wages. If such agreement was a fact, it would be held void because of a lack of mutuality.

The Howick Hall (D.C. La.) 10 F.(2d) 162.

It was respondent's original position that the rider and the supplemental agreements only governed the rights of the parties.

The original libel filed by the appellants alleged (par. 3, Aps. 4) that the bonus rate was increased to \$100.00 per month beginning December 7th, 1941, by reason of Decision No. 2 of the Maritime War

Emergency Board dated January 11, 1942, in so far as this decision related to an increase in the bonus under the terms of the last paragraph of the rider, that the crew benefit by the increase of any war bonus as the result of negotiations. Judgment in the original libel was demanded accordingly (par. 5, Libel, Aps. 5). The respondent filed exceptions to the libel on the ground: first, that all reference to the Maritime War Emergency Board Decisions must be stricken as having no application (Aps. 9) and; in the alternative, if it be held by the Court that Decision No. 2 of the Maritime War Emergency Board applied, then Decision No. 5 must also apply.

Respondent urged in its argument on the exceptions, and supported by a brief filed in the court below in support of these exceptions, that

“The increase in bonus provided by Decision No. 2 was clearly the result of a decision by the Board, who after consideration fixed the amount of bonus payable. It was not the ‘result of negotiations.’ The last bonus fixed as a result of negotiations was the \$80.00 per month provided in the October, 1941, collective bargaining agreements. The Statement of Principles specifically provides that such agreements ‘will not be violated’ by Board Decisions. The reference to Decision 2 must be stricken.”

Although this excerpt from respondent’s brief does not appear in the record, we do not believe the respondent will challenge its accuracy, and it is cited only to show respondent’s position in its argument on the exceptions.

The exceptions filed by the respondent to the orig-

inal libel were sustained (Aps. 5). No appeal having been taken by the libelants from the court's ruling on the exception, it becomes the law of the case, and an amended libel was filed.

The amended libel eliminated all reference to the Maritime War Emergency Board Decisions, and asked for recovery on behalf of the libelants at the rate set forth in the supplemental agreements, those of October 9 and October 10, 1941. Respondent answered (Aps. 22), admitting practically all of the amended libel, except that it was indebted to the libelants.

In the respondent's affirmative defense, it alleged the execution of the articles, the negotiations and the execution of agreements between the Pacific Marine Firemen, Oilers, Watertenders & Wipers and the Marine Cooks and Stewards Association of the Pacific and the Pacific American Shipowners Association on behalf of respondent (Exhibits A-3 and A-4). The answer set forth the definition of the war risk areas as defined in these agreements, referring to the Pacific area as Area 4 (Aps. 28) as all points west of the 180th Meridian. Respondent's answer quoted the provision of the Marine Cooks & Stewards agreement (Ex. A-4, Aps. 29), providing for the payment of the bonus in the case of internment:

"In the event a vessel is interned, destroyed or or abandoned as a result of war operations and is unable to continue her voyage, * * *. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein * * *." (Aps. 29)

Respondent's answer sets forth that it paid the war bonus at the rate specified while "the libelants were in the war zone described in paragraph 1(a) of said agreements" (Aps. 30). The later statement is contrary to the stipulated facts, as the men were paid their war bonuses only up to the time of the destruction of the vessel, December 29, 1941, although there is no question but that the men subsequently remained in the area. This point is discussed in more detail hereafter.

There is nothing in the respondent's answer by way of affirmative defense that has any reference to any of the decisions of the Maritime War Emergency Board, or in any way alleges or charges that there was any authority on behalf of any person or organization to modify the agreements as set forth in the shipping articles. The substance of the answer simply sets forth the agreement as being made up of the shipping articles and the applicable supplemental agreements and full performance by respondent.

Under these pleadings the issue seems simple—so simple, in fact, that the libelants moved for judgment on the pleadings, in so far as it was admitted by the respondent in open court that the men were paid their war bonus only up to the date of the destruction of the vessel, and as to this fact there was no dispute, which motion was denied. The trial proceeded on these issues, and at the trial, as hereinabove set forth, respondent offered all of the evidence relating to negotiations prior and subsequent to the date of the articles in question, and the supplemental agreements, although there was absolutely nothing in the plead-

ings about any modification of the agreement as set forth in respondent's answer or any claim of ambiguity.

Even the witness Lintner, general manager of respondent, understood that the rider was to be interpreted and determined by the results of the negotiations which were under way at the time (Aps. 98). These are the admitted agreements. Lintner did not mean and said nothing about the M.W.E.B. decisions upon which the court decided the case.

Appellants objected strenuously to the introduction of all of this evidence upon the ground that it had no materiality. The court permitted its identification upon the promise by the respondent that it would be tied up and its materiality and relationship shown, and later admitted it all.

In an attempt to consider this mass of evidence and to follow the theory of the respondent, the court became confused, and finally admitted its confusion by stating:

"This is one of the most involved cases I ever saw. That is a condition resulting directly from the war situation and from the desire of citizens, particularly those connected with the maritime industry, to cooperate with the war effort, even to the exclusion of their clear understanding of employer-employee relations.

"It is the opinion of the court, however, that this case may be solved within the principles of contract law." (Aps. 32, 33)

The court then completely abandoned these principles, when it stated that to ascertain the intention of the parties from the articles and the two supple-

mental agreements, it was necessary to add the explanatory matter contained in the other evidence received by the court (Aps. 33).

The court wholly overlooked the provision in the rider signed by the men relating to the payment of bonus during internment, a specific provision covering a specific situation. It further overlooked the fact that in the first supplemental agreement, Exhibit A-3, the one covering the engine room personnel, the appellants Steeves, Calgan and Porter, that there was no provision whatever relating to the payment of bonus during internment. Further, the court assumed the fact that in the Marine Cooks & Stewards the payment of bonus during internment, the paragraph set forth in respondent's answer applied to both agreements—when in fact it was not the case. Respondent urged that the payments are limited to a "voyage."

This paragraph provided for the payment of a bonus to the men while in the war zone. Nothing is said about any voyage; nothing said about any services on the vessel. It simply provided that in the event of destruction of the vessel or the abandonment of the voyage, not only basic wages and emergency wages were to be paid, but war bonus was to be paid to the employees while they were in the war zones defined (Aps. 124). There is no dispute that during all of the period of their internment, until the men were homeward bound on the SS GRIPSHOLM and crossed the 180th Meridian, the men were continuously west of the 180th Meridian, placing them in the defined war zone.

By way of answer to the question which was in the court's mind concerning the authority conferred by the appellants to any person to modify or change their agreement subsequent to their signing of the articles, the court concluded that the various maritime unions had authority to act for the appellants and therefore could later modify the individual agreements; that these unions, by subscribing to the Statement of Principles (Ex. K), consented to be bound by the Decision of the Maritime War Emergency Board and thereby bound appellants. It is very difficult to understand how the court could arrive at this conclusion, because the Statement of Principles itself (Aps. 199), upon which the court based this conclusion, contained the following provision:

“It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and *all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated.*” (Aps. 200) (Italics supplied)

This is the portion of the Statement of Principles upon which the respondent relied when it urged to the court, in support of its exception to the original libel, that the Decisions of the Maritime War Emergency Board had no application.

The court, after concluding from respondent's Exhibit K that authority was granted to modify the libelants' rights, follows Decision No. 5, Revised, and grants to the men war bonus for the homeward bound voyage on the GRIPSHOLM under the terms of that decision (Aps. 34), making it clear that the court, relied entirely upon Decision No. 5, Revised, of

the Maritime War Emergency Board. And yet, if the court had read that decision, we can not see how it can completely ignore the provisions of that decision, dated Feb. 21, 1942, that would have no retroactive application if the subject matter was covered by a prior agreement. It provides:

“This Decision is retroactive to December 7, 1941, *in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's Articles entered into on or before January 23, 1942*, in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942, in the case of payments provided for in Article 4 hereof, and February 21, 1942, with respect to payments provided for in Article 6 hereof.” (Aps. 281)

Article 6 of this Decision is the one which specifically concerns the payment during internment. By virtue of this provision, no part of the decision applies as there was an agreement in the ship's articles prior to Jan. 23, 1942, in fact, prior to Dec. 7, 1941, the earliest date the decision could apply.

In other words, by the terms of this Decision itself the agreement of the libelants and the respondent as contained in the ship's articles was specifically excluded from its effect.

This argument by the appellants to the binding effect of collective bargaining agreements, referred to in Exhibit K, and the portion of Maritime War Emergency Board Decision No. 5, excluding its application where the matter was covered in the ship's articles, is no waiver by the appellants of their position that neither of these documents are admissible in evidence

under the general rules of evidence relating to contracts. It is called to this court's attention to show that even if these documents were admissible, by the very terms of the documents themselves, they have no application to the situation at bar.

By way of resume, we have this situation: The pleadings make no reference whatever to the extraneous matters, or allege any modification of the agreement. Therefore, by all the rules of pleadings, such evidence would not be admissible. Despite this, they are admitted by the court. Upon the admission of such extraneous matter, a contract, which without this extraneous matter is clear in its terms, becomes confused, because of the attempt of the court to consider this extraneous matter. Confusion is then confounded and the court loses sight of the substance of the improperly admitted evidence, the extraneous matter, and arrives at a decision contrary to the provisions of the erroneously admitted evidence.

The court was correct in its statement that this case could be decided within the principles of contract law. There is no ambiguity or uncertain terms in the rider and the supplemental agreements, and the fact that these contracts concern seamen and shipping articles does not affect the application of the ordinary rules of contract and evidence. As a matter of fact, a more liberal interpretation on behalf of seamen is required under the usual rules relating to controversies between seamen and the vessel.

Shipping articles are mercantile documents, and are entitled to liberal construction, in order to accomplish the purpose the parties had in mind. They

are not to be scrutinized as if they were legal pleadings.

United States v. Westwood (C.C.A. Va.)
266 Fed. 696.

The articles, being prepared by a master, should be construed liberally in favor of the seaman.

The Catalonia (D.C. Va.) 236 Fed. 554.

The construction most favorable to the seaman will be adopted in the case of ambiguity, uncertainty or obscurity in shipping articles.

Jansen v. Theodore Heinrich, Fed. Cases
7215.

Wope v. Hemmingway, Fed. Cases, 18042.

The Disco, Fed. Cases, 3922.

Even without these liberal rules of construction, the intention of the parties can be clearly ascertained from the written agreements signed by the parties. There is nothing in these agreements of a technical nature which requires interpretation. These agreements were prepared to express the intention of men of ordinary intelligence and their full intention can be ascertained from the shipping articles.

The admissibility of any evidence other than these agreements violates the parol evidence rule that all prior negotiations both oral and written, merge in the written agreement. Subsequent evidence is not admissible to change an agreement, unless the parties to the agreement have agreed to the subsequent changes or have specifically authorized other persons to make changes on their behalf. Certainly when such alleged subsequent changes result in a reduction of

the benefits to the parties to the original agreement, the existence of such authority will be critically examined.

The District Court had in mind, as appears from the record, the question of the authority of the union to make changes in the original agreement. While recognizing the question, the court overlooked the burden of proof cast upon the party who seeks to establish such authority to make subsequent changes. The mere fact of union membership is no such authority, and does not give the union officials the right to modify the agreement to the detriment of the men covered by the particular agreement. The rule is set forth in 31 Am. Jur. 874.

“Sec. 102. *Modification of Contract.*—It has been ruled that agreements between organizations of employees and their employers are not designed to place it within the power of the organization to change or modify the contract at pleasure, so as to affect injuriously the individual rights of its members thereof secured by the agreement. This ruling is predicated upon the theory that the officers of labor unions are not to be deemed the agents of the members, so as to be able to affect their individual rights. Nor is the submission of questions involving such rights contemplated by the agreement of members of a union to comply with its rules and regulations and with the will of the lawfully constituted majority.”

31 Am. Jur. 874, citing *Piercy v. Louisville & N. R. Co.*, 198 Ky. 477, 248 S.W. 1042, 33A.L.R. 322.

Our own Circuit Court has adopted this rule, hold-

ing that there can be no modification of working agreements by union officials, unless there has been express authorization to make such modification, and the burden of establishing such authorization is upon the person alleging the same.

“Whatever may have been the custom of the respondent in dealing with the other seamen and other fishermen on other occasions, and in other seasons, could not be binding upon the libelants who were not shown to have participated in similar dealings. * * *

“It must be shown that they were aware of the agreement before their conduct can be construed as a ratification of previously unauthorized agreement. The evidence does not show such knowledge.”

Ahlquist et al. v. Alaska-Portland Packers' Ass'n. (C.C.A. 9) 39 F.(2d) 348, 350.

In a question involving the application of an union agreement or by-laws to deprive an individual of certain rights against his employer, the court, in *The Henry S. Grove* (D.C. Md.) 22 F.(2d) 444, held this could not be done without express authorization or acceptance by the employee. In that case, however, the respondent sought to establish compensation insurance by reference to the by-laws of the local union of which libelant was a member.

“But, even assuming that libelant’s local did attempt by formal action of a majority of its members to bind them all to the agreement of the parent organization, the evidence as to which is by no means satisfactory, still the court does not think that libelant could thus be deprived of such a substantive right. An intention so to do will

not be presumed. *Burke v. Monumental Div. No. 52, B. of L. Engineers* (D.C.) 273 Fed. 707." (p. 446)

Let us examine the evidence objected to by the appellants, principally the exhibits, with direct relation to the issues raised by the pleadings and the rules above stated. First, we must bear in mind the date of October 11, 1941, which is the date the articles were signed and the date the written agreement between the parties was entered into.

What possible relevancy could there be to the issue here in demands submitted by the Masters, Mates & Pilots Association and the Marine Engineers Beneficial Association to the Pacific American Shipowners Association and the American Merchant Marine Institute, dated August 16, 1941 (Resp. Ex. A, Aps. 209). The Masters, Mates & Pilots and Marine Engineers and the American Merchant Marine Institute certainly are not parties to this proceeding. These demands, and we must assume from human experience that there were counter-demands and negotiations, resulted in an agreement dated Aug. 16, 1941, which was entered into between these two licensed officers associations and the two shipowners associations (Ex. B, Aps. 213).

Respondent saw fit to attach to this exhibit when it was offered in evidence an exhibit on the exhibit, identified as a letter from Admiral Land of the War Shipping Administration, to Mr. Taylor, president of the American Merchant Marine Institute, dated July 21, 1941 (Aps. 219), calling a conference in Washington, D. C., and the opening remarks of Com-

missioner McCauley (Aps. 221) at this conference. While interesting perhaps and informative, we fail to see where this exhibit could have the remotest relevancy or assist the court to determine what was the intention of the parties involved in this litigation when they signed the shipping articles in question at Portland, Oregon, on the 11th day of October, 1941.

At the same conference in Washington on August 12, 1941, the American Merchant Marine Institute and the Pacific American Shipowners Association submitted their own proposals concerning the bonus question to the licensed officers, both deck and engine room department (Ex. G, Aps. 242). If not merged into prior agreements, dated Aug. 16, 1944, certainly these proposals were merged into the agreement of the licensed officers, dated Oct. 10, 1941 (Ex. A-5, Aps. 259), which was introduced by the respondent.

The same situation is true of respondent's Exhibit H (Aps. 244), the proposals of the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association, which was dated September 15, 1941. These were merged into the agreement which was introduced and admitted without objection as being the supplemental agreement (Ex. A-3) referred to in the articles. In this Exhibit H, the marine firemen asked for \$10,000.00 insurance, they asked for bonus during internment, they asked for room rent while ashore, and made demands for a great many items which did not appear and were apparently abandoned at the time the ultimate agreement (Ex. A-3) was entered into.

Respondent's Exhibit C attached to Mullins Deposi-

tion (Aps. 223), dated August 18, 1941, is a circular letter addressed to the members of the American Merchants Marine Institute setting forth the views of Mr. Frank J. Taylor and the results of the conference theretofore held in Washington, D. C., with the licensed officers associations. We fail to see by what processes of imagination there could be anything in that letter that would be binding upon the libelants, West Coast seamen, who signed a contract approximately two months later or have any bearing on their intentions at that time.

Respondent offered and the court admitted Decision No. 80, of the National Defense Mediation Board (Ex. D, Aps. 226), which decided a specific controversy, not between any of the libelants or the respondent, but between various steamship companies and their licensed personnel represented by their unions and the Sailors Union of the Pacific, no parties to this proceeding either directly or by representation. And the result of this hearing is what? A decision? No! The board hands down certain recommendations. The board recommends certain rates of bonus in certain areas. Nowhere in this document is there one word concerning the payment of a war bonus in the event of the internment of the crew of a vessel. The dispute in the case at bar concerns only the question of the payment of the bonus during internment, not the rate at which it will be paid. That rate has been stipulated. Therefore, what is the materiality of Decision No. 80? None whatever!

Let us examine some of the documents and evidence which were introduced which came into being after

October 11, 1941. The articles signed on October 11, 1941, fix the rights of the parties thereto, unless they consent or directly delegate to others the right to subsequently modify the agreement. At the time the first of these exhibits, Resp. Ex. K (Aps. 199), the Statement of Principles, was signed, the appellants were on the other side of the world. It was the impact of the war, Pearl Harbor, an occurrence which arose after the agreement was signed, and which might fairly have been said to have been contemplated within the agreement, that brought most of these exhibits into being. The rider, dated October 11, 1941, was signed with the understanding that there was a definite risk of war, and certainly was not signed with the intention that if there was a war, the rights of the men signing such document would be diminished by delegating to others the power to make such agreements for them.

Exhibit K (Aps. 199), adopted December 17, 1941, was the one upon which the court placed such great emphasis in its decision. Despite the most strenuous objection by appellants' counsel, and even despite the argument by respondent's counsel on the point of the Wagner Labor Relations Act (Aps. '95) (which was further confusing) the court admitted this exhibit. There is not one bit of evidence in the record, other than counsel for respondent's own statement, that appellants authorized their union representatives to change their agreement after they sailed. We challenge counsel to point out evidence of such authority. The mere fact of union membership alone is not such authority. The court recognized this (Aps. 95) and

yet unfortunately assumed, without any record to support the assumption, that such authorization in fact existed. At the time of these negotiations and the adoption of the Statement of Principles, the men were at sea and in fact had already discharged part of their cargo at Manila.

This very document itself shows that it is prospective in its operation. Without waiving the right to strike, Maritime labor gives the Government assurance that the exercise of this right will be withheld for the period of the war (Aps. 199) and

“To provide machinery for the settlement of disputes without interruption of service or stoppage of work during the period of the war and to insure the application of the maximum war effort * * *.” (Aps. 200)

This exhibit also provides that the unions representing the personnel of the American Merchant Marine and the operators of those vessels have pledged themselves to cooperate wholeheartedly in the all-out war effort of the government, and to take no action during the war emergency which shall cause any interruption of the service of such vessels (Aps. 201).

Not only was there no authority within this Statement of Principles, dated December 17, 1941, to make any change in any pre-existing agreement, the agreement itself was very careful to protect the prior rights that had already been fixed as the result of agreement:

“It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and all

agreements and obligations arising as a result of collective bargaining agreements will in no way be violated." (Aps. 200)

In the light of this statement in the agreement itself, we cannot conceive how the district court made such an error. Even respondent adopted the position that this agreement did not apply when it used the above section to maintain the validity of the supplemental agreements (Resp. Ex. A-3 and A-4) to prevent an increase in the payment of the bonus set forth in those agreements on his exceptions to the original libel.

The court, having fallen into this error, then assumed that Decision No. 5, Revised (Ex. A-11, Aps. 279) applied. Again, we have the question of time involved. This decision was dated February 21, 1942, when the libelants had been in prison for almost two months. (We have already referred in our Statement of the Case to the fact that by the very terms of Decision No. 5, Revised, Exhibit A-11, all persons in possession of original Decision No. 5, and attached supplements, Exhibit A-12 (Aps. 287) were requested to destroy the same and they were to be of no effect as superseded by Decision No. 5, Revised). There is no evidence in the record where the libelants in this case, or any member of the crew of the SS CAPILLO, authorized the Maritime War Emergency Board to act for them. Even were it admissible on the theory that there was some authority, had the court read these exhibits we cannot understand how it failed to consider that portion of both decisions No. 5, either in the original form or revised form, which provided

that they were only retroactive to December 7, 1941 (yet the articles were signed on October 11, 1941), and retroactive only in those cases where there was no agreement with respect to the subject matter of Decision No. 5 prior to the 21st day of February, 1942.

“This Decision is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's Articles entered into on or before January 23, 1942, in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942, in the case of payments provided for in Article 4 hereof, and February 21, 1942, with respect to payments provided for in Article 6 hereof.” (Aps. 281)

We believe that there can be no question on the conclusion that not only was there no authority to make any subsequent change, but all of the documents offered by the respondent and upon which respondent relies disclose a positive intention, by specific reference thereto, that the rights and privileges arrived at in prior agreements would not be changed or modified.

As far as Maritime War Emergency Board Decision No. 2 is concerned (Ex. A-2, Aps. 270), we have been unable to find one word therein which has any relation to the question of the payment of bonus during internment, which is the only issue here. This exhibit is wholly devoid of any materiality both as to the question of time when it was issued and in substance.

Exhibits A-5 (Aps. 259), A-6 (Aps. 265), A-7 (Aps. 266) and A-8 (Aps. 266) were supplemental

agreements with other unions than those representing the libelants. These agreements covered, respectively, the licensed deck officers, the licensed engine room personnel, the deck crew and the radio operators. None of the appellants are members of these groups. Even the respondent does not content that they had any connection with the other unions or that the unions had any authority to act for them. We might as well introduce the agreement between the long-shoremen and their employers in the Port of San Francisco establishing an increase in pay and an agreement they would not strike during the war. Such agreement has a direct relationship to the war effort and is maritime in nature, but that does not make it material to the situation in the case at bar.

The only other of respondent's exhibits not discussed are Exhibit E (Aps. 231) and Exhibit F (Aps. 236), these two being supplemental agreements between the American Merchant Marine Institute, representing some of the Atlantic Coast operators, and the National Maritime Union. Exhibit E relates to the payment of war bonuses, being dated November 6, 1941, and being only the blank form of an agreement between the N.M.U. and unnamed operator. Exhibit F relates to the payment of a war bonus for a trip to Russia, also in blank form.

The appellants and all members of the crew of the SS Capillo, being West Coast men, were not only not represented by the National Maritime Union, but were in fact in conflict with that union and they were rival unions. What place do these documents have in this proceeding, and how could they be of any value in

determining the intention of the parties in the articles on the Capillo?

We do not feel it necessary to discuss the testimony of the witnesses Mullins and Bryan, as most of the testimony relates to the identity of the exhibits herein referred to. Suffice it to say that neither of these estimable gentlemen had anything to do with either the appellants or the respondent in the transaction in the signing of the articles, out of which the appellants' claim arose. While the efforts of these gentlemen in the support of the war effort by keeping labor relations of their respective associations on an even keel deserve commendation, such efforts can hardly be of assistance to the court in determining the issues involved in this proceeding.

We have not referred to the general rule that master agreements entered into between a union and an association or representatives of employers are not of themselves binding until incorporated or adopted by specific agreement between the employees and a particular employer.

“The initial agreement itself acquired no legal force until the parties directly and immediately concerned contracted with reference to it. Until closed by specific acceptance on the part of the parties so concerned, the agreement remained incomplete. *Rentschler v. Missouri Pac. R. Co.*, 126 Neb. 493, 253 N.W. 694, 95 A.L.R. 1; 31 Am. Jur. 872, Labor, §97.

Clark v. Claremont Apt. Hotel Co., 19 Wn. (2d) 115, 122, 123, 141 P.(2d) 403.

The reason therefore is that no question has been

raised, either by the pleadings or by counsel on the application of the supplemental agreement, which is the only general agreement which is effective in the case at bar (Exhibit A-3 and A-4). Respondent has stipulated to this fact. We feel that the reference to such cases is not necessary in view of the fact that there are not other collective bargaining *agreements* between the union and members of the crew involved in these proceedings other than the two agreements mentioned.

The appellants recognize that a trial court, sitting in admiralty, has a wide latitude in the admission or rejection of evidence, but even within this latitude the rules of relevancy and materiality must be followed. These rules must be applied with relation to the particular issues before the court. That the court committed error in permitting the evidence objected to to be introduced, we feel, is clearly apparent.

.

CONCLUSION

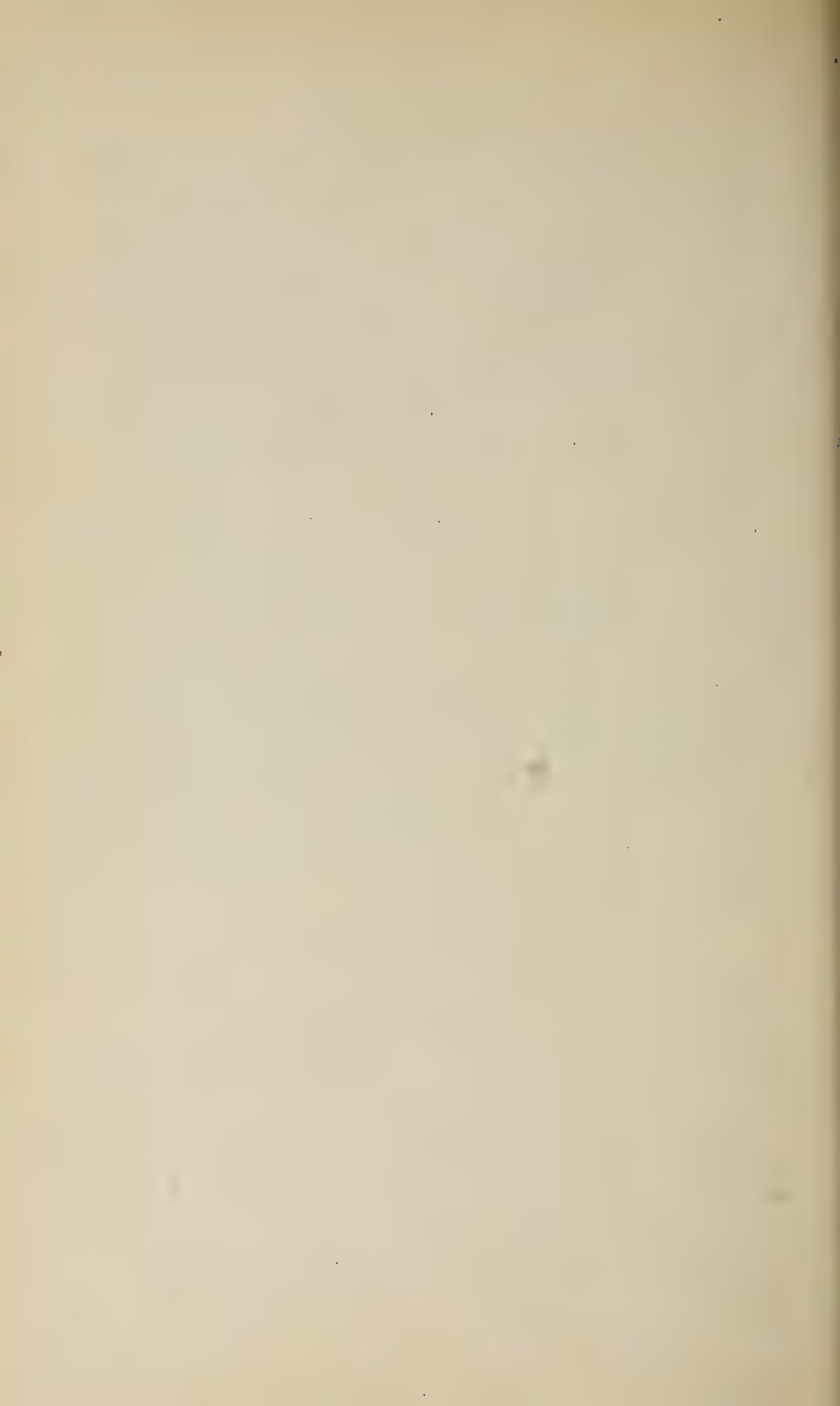
This is a contract, as set forth in the libel, which is made up of three documents, and no more; the shipping articles including the rider, Exhibit A-3, supplemental agreement for the engine room department, covering Steeves, Calgan and Porter, and Exhibit A-4, the Marine Cooks and Stewards supplemental agreement covering Taylor. The intention of the parties, as set forth in these documents, is clear. They provide for the payment of bonus during internment.

The facts are admitted: that no bonus was paid to the men during their period of interment. The judgment should be reversed, with instructions to enter a decree in favor of each appellant for the payment of bonus at the rate of \$80.00 per month from the 29th day of December, 1941, to the 7th day of December, 1943, the date of their arrival on a Pacific Coast port after leaving New York, and \$125.00 for each appellant, the stipulated value of the transportation from New York to the Pacific Coast.

Respectfully submitted,

SAM L. LEVINSON,

Proctor for Appellants.



APPENDIX

[Title of District Court and Cause]

ASSIGNMENTS OF ERROR (Aps. 54 to 72)

The appellants, Edward J. Steeves, Hugo Calgan, William A. Porter and Samuel S. Taylor, hereby assign as error in the proceedings, decree, orders and decision of the District Court in the above entitled action, as follows:

(1) The District Court erred in entering Finding of Fact III upon the grounds that such finding is immaterial and irrelevant to the issue, and there was no competent evidence to support said finding.

(2) The District Court erred in entering Finding of Fact IV on the grounds that said finding is immaterial and irrelevant, and there is no competent evidence to support said finding.

(3) The District Court erred in entering Finding of Fact V upon the grounds that such finding is immaterial and irrelevant to the issue, and that there is no competent evidence to support said finding.

(4) The District Court erred in entering Finding of Fact VI, on the grounds that said finding is immaterial and irrelevant.

(5) The District Court erred in entering Finding of Fact VII, on the grounds that said finding is immaterial and irrelevant.

(6) The District Court erred in entering Finding of Fact VIII, on the grounds that said finding is immaterial and irrelevant.

agreements (Aps. 170), and that subsequent negotiations did take place.

Mullins further testified (Aps. 170) that on September 22, 1941, another conference was called by telegraphic request from Admiral Land to Mr. F. A. Taylor, President of the Institute (Aps. 171). Apparently it was never held. Shortly after the receipt of the telegram calling the conference, a dispute between the Seafarers International Union and the companies with which it was negotiating was certified to the National Defense Mediation Board. (The respondent American Mail Line was not one of the companies.) A hearing was had by the Board on this certification and the decision was handed down, identified as Decision No. 80, and offered in evidence in this proceeding as respondent's Exhibit D (Aps. 172) and admitted by the court (Aps. 209).

Respondent's Exhibit D was a copy of the decision of the National Defense Mediation Board (Aps. 226) and followed hearings which were held September 29 and October 1, 2, 3, and 4, 1941. The date which this decision was handed down does not appear in the record. This decision set forth certain recommended bonus rates for defined war areas. Mr. Mullins further testified (Aps. 172) that the copy offered in evidence was not a true copy in that it did not contain a statement on the original in his file that the representatives of the shipowners agreed to urge those whom they represented to accept these recommendations, and that the representatives of the Sailors Union of the Pacific agreed to urge those that they represented to accept its recommendations, and the representa-

tives of the Seafarers International Union, though not fully in accord with the recommendations, agreed to carry them back to the union membership and explain to them why they should accept it (Aps. 173).

Respondent's Exhibit "D" also contained the provision (Aps. 231) that nothing in the recommendations should be so interpreted as to reduce benefits now existing under collective bargaining contracts. There is not a word in this exhibit relating to the payment of war bonus during internment. Appellants' challenge that this exhibit had absolutely no materiality or relevancy and did not concern any of the parties to this case at bar was overruled and the exhibit was admitted (Aps. 209).

Mullins further testified (Aps. 174) that commencing in September, 1941, the Institute, on behalf of some 23 or 24 of its member companies (in which the respondent was not represented) was in negotiation with the National Maritime Union for the renewal of current collective bargaining agreements. (The National Maritime Union, an east coast union, is a bitter opponent of the west coast unions). These negotiations culminated in an agreement dated November 6, 1941, after the vessel on which the libelants were employed had been at sea for some nineteen days. This resulted in the development of a standard form of contract signed by all of the member companies of the institute which had recognized the NMU as the agent for collective bargaining for their unlicensed personnel (Aps. 175).

This standard form of contract was identified as respondent's Exhibit E (Aps. 231), and although the

appellants again objected concerning the relevancy of this document signed after the rider to the articles in question, and between parties who had no connection with any of the parties interested in this litigation, the objection was overruled and the document was admitted (Aps. 209).

Mullins further testified that there was a further supplemental agreement entered into between the National Maritime Union and various companies, members of the Institute, which was negotiated on December 2, 1941, relating to bonus for a voyage to Russia (Aps. 176). This exhibit is in blank form and set out on page 236 of the Apostles on Appeal, and was identified as respondent's Exhibit F, and despite continued objections by appellants concerning its materiality and relevancy the same was admitted in evidence by the courts (Aps. 209).

Under questioning by counsel for respondent, Mullins testified that the National Maritime Union agreements remained in effect until the establishment of the first Maritime War Emergency Board. Respondent's Exhibit B (Aps. 176), the agreement with the licensed officers, was subsequently superseded by the agreements heretofore referred to as Exhibits A-5 and A-6, although Mullin testified there was no other agreement (Aps. 178), only some recommendations by the commission.

Mullins also testified concerning the negotiations between his Institute and the American Communications Association, which never materialized in a contract (Aps. 178) until after the matter was referred

to an arbitrator named by the United States Department of Labor (Aps. 179) in February, 1942.

This witness also brought out the fact that the NMU is a union which represents all departments of unlicensed personnel on the vessels on the Atlantic coast (Aps. 180), and although the Seafarers International Union represented some of the unlicensed personnel, no agreement existed between the American Merchant Marine Institute and the Seafarers International Union covering war bonus in the fall of 1941.

The witness Mullins discussed the exhibits heretofore identified in his deposition (Aps. 181) and brought out the fact that there were some differences in some of the contracts prior to the fall of 1941 (Aps. 181) concerning payment of bonus during internment and the contracts were not standardized as far as the Atlantic and the Gulf were concerned for the licensed personnel until August, 1941, and for the unlicensed personnel until November and December, 1941. He thought that his association and negotiations set the pattern, generally speaking, for the labor agreements on the Atlantic and Pacific Coast (Aps. 182), and testified concerning his meaning of the words emergency compensation and war bonus (Aps. 184, 185). Appellants objected to all of the testimony of the witness Mullins, which objection was overruled and the court admitted this testimony (Aps. 159).

J. B. Bryan testified on behalf of respondent in the form of answers to written interrogatories to which the appellants objected (Aps. 159) upon the

ground the questions and answers were not material. His testimony was that the Pacific American Shipowners Association of which he was president was formed in 1936, and acted in labor relation matters with seafaring unions; that commencing in 1939 collective bargaining agreements contained certain war bonus provisions; that confusion arose because of separate agreements entered into by various companies and rivalry between Pacific and Atlantic unions (Aps. 189), resulting in a series of conferences held in Washington, D. C., where uniform agreement for licensed and unlicensed personnel was entered into.

The witness Bryan participated in these negotiations. He identified written demands made by two unions, Exhibit G (Aps. 242). He also identified and testified to counter-proposals, dated August 12, 1941, made by the Pacific American Shipowners Association and the American Merchants Marine Institute to the demands of the two unions representing the licensed personnel. This exhibit was admitted in evidence over libelants' objection (Aps. 241).

The Pacific Coast Marine Firemen, Oilers & Wartetenders Association also made a proposal as to what they considered fair on the question of war bonus, and this proposal was dated September 15, 1941 (Aps. 244), and this proposal was identified as respondent's exhibit H, and admitted over libelants' objection. The witness Bryan also identified respondent's Exhibit I (Aps. 250), which was the proposal submitted by the Sailors Union of the Pacific, dated September 16, 1941, supported by the reasons which that organization felt should prevail. This was also

admitted (Aps. 241) over appellants' objections as to the materiality. Finally, he identified respondent's Exhibit J (Aps. 255), which was a letter written by S. J. Hogan, president of the National Marine Engineers' Beneficial Association, under date of October 24, 1941, directed to Frank J. Taylor, President of the American Merchant Marine Institute and calling Mr. Taylor's attention to the fact that the August 16, 1941, war risk agreement with his organization, entered into on the Pacific Coast, and the supplemental agreement (A-6) were not alike. Although the appellants had great difficulty in seeing the materiality of such a document to the issues involved in the case at bar, and called the same to the court's attention by appropriate objection, it was admitted in evidence (Aps. 241).

The witness Bryan also identified the same documents testified to by the witness Mullins in his deposition, the demands made by the Radio Operators Association, the demands made by the Sailors Union of the Pacific, and the hearing in Case No. 80 before the National Defense Mediation Board, which hearing was held in October, 1941. He identified the dates upon which the supplementary agreements were entered into between the Pacific Shipowners Association and the six unions representing the sea-going personnel (Respondent's Exhibits A-3, A-4, A-5, A-6, A-7 and A-8). He was also interrogated concerning certain communications between his association and the American Merchant Marine Institute concerning the language in the contracts and fortunately, from the standpoint of the record, could testify to no other

communications other than Exhibit J, which had theretofore been introduced.

This witness also testified that there had never been any protest to his knowledge (Aps. 198) from either his association, the American Merchant Marine Institute, or any of the six Pacific Coast maritime unions to the Maritime War Emergency Board protesting or criticizing the action of the Board in adopting the rule laid down in Article 6 of Decision No. 5, Revised, of Maritime War Emergency Board, dated February 21, 1942, limiting the period of the payment of war bonus. This was introduced by the respondent apparently to show that there was no protest by the appellants, who at the time the decision was announced, had already been prisoners of the Japanese in some prison camp in the Orient for approximately two months and remained such prisoners until repatriated.

The Court announced its decision (Aps. 32) that it could not ascertain the intention of the parties without reference to all of the evidence admitted, and concluded that because the unions to which the libelants were members approved the Statement of Principles (Resp. Ex. K), that the action of the unions in subscribing to this Statement of Principles constituted libelants' consent to be bound by the decision of the Maritime War Emergency Board, and therefore followed the rulings of that board in not allowing a war bonus during internment, despite the provision of the shipping articles. Findings of fact and decree in accordance with the decision was entered. This appeal followed.

SPECIFICATIONS OF ERROR RELIED UPON

The cause of action set forth in the libel is based on written shipping articles executed October 11, 1941, between respondent and appellants. The articles contain a rider which provides for the payment of war bonus in accordance with the applicable supplementary agreements, during internment of the crew. Three of the appellants being members of the Pacific Coast Firemen, Oilers, Watertenders & Wipers Association, the applicable supplemental agreement is Exhibit A-3, dated October 9, 1941. The remaining appellant, being a member of the Pacific Coast Marine Cooks and Stewards Association, the applicable supplemental agreement is Exhibit A-4, dated October 10, 1941. By these supplemental agreements the bonus rate is \$80.00 per month.

Evidence of negotiations, conferences and agreements prior to October 11, 1941, are merged into the agreement and are not admissable. Evidence of negotiations, conferences, and agreements, occurring subsequent to October 11, 1941, between unions, of which none of the appellants are members, and ship-owners associations of which respondent is not a member, and decisions of administrative boards and tribunals formed after December 7, 1941, with quasi-judicial powers, are not admissible in this proceeding, and are not binding on appellants.

Findings of Fact, Conclusions of Law and the Decree based upon such improper evidence are erroneous. As all of the assigned errors are based upon the admission of evidence over the objection that such evidence is not material or relevant to the issues, and

the findings of fact made in accordance therewith, appellants will discuss them all under one heading.

The specified Assignments of Error relied upon by appellants appear in the record as follows:

Assignments of Error 1 to 10, inclusive (Aps. 54, 55), relating to Findings of Fact III to XII, inclusive (Aps. 37-40).

Assignment of Error 11 (Aps. 55) relating to Conclusions of Law I, II and III (Aps. 49).

Assignments of Error 12 and 13 (Aps. 56) relating to the entry of the Decree (Aps. 50).

Assignment of Error 14 (Aps. 56) relating to the admission, over appellants' objection, of Respondent's Exhibit K (Aps. 199).

Assignment of Error 15 (Aps. 58) relating to the admission, over appellants' objection, of Respondent's Exhibit A-5 (Aps. 259).

Assignment of Error 16 (Aps. 58) relating to the admission, over appellants' objection, of Respondent's Exhibit A-6 (Aps. 265).

Assignment of Error 17 (Aps. 59) relating to the admission, over appellants' objection, of Respondent's Exhibit A-7 (Aps. 266).

Assignment of Error 18 (Aps. 59) relating to the admission, over appellants' objection, of Respondent's Exhibit A-8 (Aps. 266).

Assignment of Error 19 (Aps. 59) relating to the admission, over appellants' objection, of Respondent's Exhibit A-10 (Aps. 270).

Assignment of Error 20 (Aps. 60) relating to the

admission, over appellants' objection, of Respondent's Exhibit A-11 (Aps. 279).

Assignment of Error 21 (Aps. 61) relating to the admission, over appellants' objection, of Respondent's Exhibit A-12 (Aps. 287).

Assignment of Error 22 (Aps. 62) relating to the admission over appellants' objection, of Exhibit "A," Mullins Deposition (Aps. 209).

Assignment of Error 23 (Aps. 63) relating to the admission over appellants' objection, of Exhibit "B," Mullins Deposition (Aps. 213).

Assignment of Error 24 (Aps. 63) relating to the admission, over appellants' objection, of Exhibit "C," Mullins Deposition (Aps. 223).

Assignment of Error 25 (Aps. 64) relating to the admission, over appellants' objection, of Exhibit "D," Mullins Deposition (Aps. 226).

Assignment of Error 26 (Aps. 66) relating to the admission, over appellants' objection, of Exhibit "E," Mullins Deposition (Aps. 231).

Assignment of Error 27 (Aps. 66) relating to the admission, over appellants' objection, of Exhibit "F," Mullins Deposition (Aps. 236).

Assignment of Error 29 (Aps. 67) relating to the admission, over appellants' objection, of Exhibit "G," Bryan Deposition (Aps. 242).

Assignment of Error 30 (Aps. 67) relating to the admission, over appellants' objection, of Exhibit "H," Bryan Deposition (Aps. 244).

Assignment of Error 31 (Aps. 68) relating to the

admission, over appellants' objection, of Exhibit "I," Bryan Deposition (Aps. 250).

Assignment of Error 32 (Aps. 68) relating to the admission, over appellants' objection, of Exhibit "J," Bryan Deposition (Aps. 255).

Assignment of Error 33 (Aps. 69) relating to the admission, over appellants' objection of the testimony of the witness Mullins (Aps. 160-187).

Assignment of Error 34 (Aps. 69) relating to the admission, over appellants' objection, of the testimony of the witness Bryan (Aps. 187-198).

The Assignments of Error relied upon are set forth in full in the Appendix to this brief.

ARGUMENT ON THE ASSIGNMENTS OF ERROR

The cause of action set forth in the libel is based on written shipping articles executed October 11, 1941, between respondent and libelants. The articles contain a rider which provides for the payment of war bonus in accordance with the applicable supplementary agreements during internment. Three of the appellants, being members of the Pacific Coast Firemen, Oilers, Watertenders & Wipers Association, the applicable supplemental agreement is Exhibit A-3, dated October 9, 1941. The remaining appellant, being a member of the Pacific Coast Marine Cooks & Stewards Association, the applicable supplemental agreement is Exhibit A-4, dated October 10, 1941. By the terms of these supplemental agreements, the bonus rate is \$80.00 per month. Evidence of negotiations, conferences and agreements prior to October 11, 1941, are merged into the agreement and are not admissible. Evidence of negotiations, conferences, and agreements, occurring subsequent to October 11, 1941, between unions, of which none of the appellants are members, and shipowners associations of which respondent is not a member, and decisions of administrative boards and tribunals formed after December 7, 1941, with quasi-judicial powers, are not admissible in this proceedings, and are not binding on appellants. Findings of fact, conclusions of law and the decree based upon such improper evidence are erroneous.

In the case at bar there are no disputed questions of fact. The libel is a simple action on a contract of employment as evidenced by the shipping articles and the attached rider. The rider, agreed to by respondent and the members of the crew, including the appel-

lants, men of ordinary intelligence, provides (1) for the payment of a war bonus, and reads as follows:

“The American Mail Line agrees to pay an emergency war bonus to the crew of the SS CAPILLO, Voyage Six (6), in accordance with the provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners’ Association and the various Marine Unions.”,

(2) the possibility of internment or imprisonment as a result of war, and for payment in the event of such contingency and the length of the payment as follows:

“In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay *wages and bonus* to the date members of the crew arrive in an United States port, on the Pacific Coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port on the Pacific Coast. Also that the company be liable for any injuries suffered by any crew member due to war causes.” (*Italics supplied*)

The vessel and the crew knew that there were pending negotiations where the question of increase of compensation and war bonus might be considered, and so they covered that by providing:

“It is further agreed that in the event of any *increase in pay, overtime or war bonus* or changes in insurance which may be granted, as the result of negotiations between Union and the Pacific American Shipowners’ Association, the Company will be governed by the terms and ef-

fective date of any agreement so reached." (Italics supplied)

Thus it appears that the only place where the rider is not complete is that portion which relates to the amount of the bonus or the rate at which it is to be paid. In order to determine that, the parties to this agreement referred to the applicable supplemental agreements which were in effect or about to go into effect at that time between unions representing the men and the Pacific American Shipowners' Association. The one covering the three appellants who were members of the engine room crew is Respondent's Exhibit A-3, dated October 9, 1941, between the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and the Pacific American Shipowners Association. The one covering the other appellant is Respondent's Exhibit A-4, which is the agreement between the Pacific Coast Marine Cooks & Stewards Association and the Pacific American Shipowners Association, dated October 10, 1941.

In the agreement between the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association and the Pacific American Shipowners Association (Ex. A-3, Aps. 114) the union adopts and makes effective certain recommendations of the National Defense Mediation Board, and agrees on the establishment of five war risk zones, and provides for a war risk bonus at the rate of \$80.00 per month on four of these zones, which includes the voyage in question. This supplemental agreement is silent on any question of internment or destruction of the ship due to war causes. This agreement applies to the appellants

Steeves, Calgan and Porter, who were members of the engine room department.

Exhibit A-4, the agreement between the Pacific Coast Marine Cooks & Stewards Union and the Pacific American Shipowners Association, was dated October 10, 1941, and sets forth the same areas and rate of bonus as in Exhibit A-3. However, this agreement has additional provisions which set forth the machinery relating to future adjustments, provides for the carrying of war risk insurance in the sum of \$5000.00, and specifically provides for the payment of a war bonus in the event of internment or destruction of the vessel while the employees are in the war zones defined.

It is, therefore, apparent that these two agreements supply the missing data in the articles, that is, the rate of bonus. While Exhibit A-4 affecting one appellant goes further and makes provision for the payment of war bonuses in the event of internment, it is apparent that the parties, having definitely agreed in writing in the rider on the length of time war bonus would be paid in the event of internment, did not intend to vary this portion of the agreement by the incorporation of contrary or other provisions in the supplemental agreements.

“A written instrument must ordinarily be interpreted to mean what on its face it purports to mean, unless some good reason can be assigned to show that the words used should be understood in a different sense.”

12 Am. Jur. 751.

“Where a contract as a whole discloses a given

intention, they will be interpreted, if possible, so as to be consistent with the general intent."

12 Am. Jur. 774.

The foregoing statements support the fundamental rule that when the parties to an agreement have contracted with reference to a particular situation, the length of time for payment of the war bonus, a reference to another document for another purpose will not defeat such intention.

While it will be admitted that it may be possible to raise some argument on the Marine Cooks & Stewards agreement covering the appellant Taylor in that there was provision both in the rider and the supplementary agreement relating to the length of time that war bonus is paid. common experience would indicate that this could not have been the intent of the men in the light of the specific provision in the rider which was known to them when they signed and when the terms of the supplementary agreement were then as yet unknown.

This is particularly true when it is borne in mind that the issues presented in this case are not between the unions as such and the Pacific American Ship-owners Association or its representative, but the issues here are between the four members of the crew of the SS CAPILLO and the respondent operator of the vessel. It was the men who had agreed upon the length of time for which the bonus would be paid in the event of internment and that was until the men returned to the Pacific Coast. They had not, however, as yet agreed on the rate, and therefore it was

necessary that they refer to the supplemental agreement to determine the rate.

Here then we have the completed contract. The contract fixed the compensation to be paid for the considered risk arising out of a voyage into war zones and the length of time such compensation was to be paid in the event of a materialization of the hazard, the destruction of the vessel and imprisonment of the crew. The men sailed, leaving the haven of the Pacific Coast waters on October 21, 1941. The men faithfully carried out their duties without complaint and brought the vessel and its cargo into waters which they had good cause to believe, before sailing, would be dangerous and hazardous. They had contracted to do so, and that was all there was to it.

The calculated risk which all parties considered materialized. The ship was attacked, destroyed and the crew was captured by the enemy, and they were imprisoned on December 29, 1941. They became prisoners of war, all normal communication with home was cut off, and the men took what comfort they could while suffering imprisonment from the knowledge and belief that upon their return to the Pacific Coast of the United States, whenever that might be, they would be paid not only their wages for operating the vessel, but the additional compensation of wages and war bonus as partial compensation for the hazards, the suffering and the anguish during long months of imprisonment. These were hazards which the men were not required to assume, and assumed only because the respondent was anxious to secure a crew for this voyage (Lintner, Aps. 102), and to send

the vessel and its cargo into these waters for the payment of such war freight rates as the conditions demanded. These men had no way of knowing that any changes were made or would be made in what they believed would be their pay when they returned to the United States.

Finally came the great day of repatriation, after many heart-breaking delays and postponements, and then when they are at last returned to the soil of the United States, they are met at the dock by a representative of the steamship company for the purpose of payment, and then for the first time they are advised that they will receive their wages while on the vessel and during such time as they were in prison, but that their war bonus, which each libelant believed the respondent had agreed to pay, would not be paid.

The respondent, remaining adamant in its position concerning the payment of war bonus during the period of internment, there was no other alternative but to bring an action on the contract.

Although throughout this discussion the payment has been referred to as 'war bonus,' it is nevertheless wages for services performed under extraordinary conditions and must be treated as such.

"War bonuses" are additional wages paid to the crew members to induce them to accept employment. Such bonuses are treated as wages, and are supported by a valid consideration.

"There can be no question but that the 'so-called' war bonus was additional wages for extra hazardous service. It was awarded as a result of a demand for increased wages, and was paid

for services rendered, and for nothing else. To call a portion of such wages a 'war bonus' does not alter its essential character."

Lokos v. Saliaris (The Leonidas) (C.C.A. 2) 116 F.(2d) 440, 442.

The added risk assumed is a valid consideration. If the vessel becomes unseaworthy during the voyage, a contract for a bonus to induce the seaman to assume the added risk, instead of taking his discharge, rests on a good consideration.

The Jacob Luckenbach (Dt. Ct. La.) 36 F. (2d) 381.

The steamship company agreement to pay crew members extra wages for sailing a vessel from Hampton Roads, to which it returned after leaving the convoy because of unseaworthiness, was valid.

The Louise (D.C. Maryland) 54 F. Supp. 157.

Where the crew signed on a vessel under a 100% bonus arrangement for a trans-Atlantic voyage, and the voyage terminated at South Carolina because of the condition of the vessel, it was held that the seamen were, nevertheless, entitled to their double wages.

The Herbert L. Rawding (D.C. So. Car.) 55 F. Supp. 156, 161.

Despite the attempt of the respondent to treat the war bonus as something other than wages, as a "bonus" or gratuity, it is apparent even from the cross-examination of the witness Mullins (Aps. 186) that the payment of these war bonuses was compensation for the risk which the men assumed by reason of the war hazard.

The position of respondent admits to an attempt to reduce the wages by the incorporation of other agreements. Such attempt is contrary to the statutory provision relating to shipping articles which require that the rate of wages be set forth at the time the men sign on.

46 U.S.C.A. 564.

In interpreting this section of the statute, it has been held that a provision of the shipping articles providing that the wages named were subject to change in accordance with a new schedule to be adopted by the shipowners was held to be invalid as not complying with the statute requiring the articles to state the wages to be paid.

Jones v. United States (D.C. Md.) 284 Fed. 721.

It has also been held that the provision of shipping articles, making any change in working rules or wages retroactive, to be applicable only to the agreement to which the seamen were actually or constructively parties, and not to an arbitrary reduction of wages. If such agreement was a fact, it would be held void because of a lack of mutuality.

The Howick Hall (D.C. La.) 10 F.(2d) 162.

It was respondent's original position that the rider and the supplemental agreements only governed the rights of the parties.

The original libel filed by the appellants alleged (par. 3, Aps. 4) that the bonus rate was increased to \$100.00 per month beginning December 7th, 1941, by reason of Decision No. 2 of the Maritime War

Emergency Board dated January 11, 1942, in so far as this decision related to an increase in the bonus under the terms of the last paragraph of the rider, that the crew benefit by the increase of any war bonus as the result of negotiations. Judgment in the original libel was demanded accordingly (par. 5, Libel, Aps. 5). The respondent filed exceptions to the libel on the ground: first, that all reference to the Maritime War Emergency Board Decisions must be stricken as having no application (Aps. 9) and; in the alternative, if it be held by the Court that Decision No. 2 of the Maritime War Emergency Board applied, then Decision No. 5 must also apply.

Respondent urged in its argument on the exceptions, and supported by a brief filed in the court below in support of these exceptions, that

“The increase in bonus provided by Decision No. 2 was clearly the result of a decision by the Board, who after consideration fixed the amount of bonus payable. It was not the ‘result of negotiations.’ The last bonus fixed as a result of negotiations was the \$80.00 per month provided in the October, 1941, collective bargaining agreements. The Statement of Principles specifically provides that such agreements ‘will not be violated’ by Board Decisions. The reference to Decision 2 must be stricken.”

Although this excerpt from respondent’s brief does not appear in the record, we do not believe the respondent will challenge its accuracy, and it is cited only to show respondent’s position in its argument on the exceptions.

The exceptions filed by the respondent to the orig-

inal libel were sustained (Aps. 5). No appeal having been taken by the libelants from the court's ruling on the exception, it becomes the law of the case, and an amended libel was filed.

The amended libel eliminated all reference to the Maritime War Emergency Board Decisions, and asked for recovery on behalf of the libelants at the rate set forth in the supplemental agreements, those of October 9 and October 10, 1941. Respondent answered (Aps. 22), admitting practically all of the amended libel, except that it was indebted to the libelants.

In the respondent's affirmative defense, it alleged the execution of the articles, the negotiations and the execution of agreements between the Pacific Marine Firemen, Oilers, Watertenders & Wipers and the Marine Cooks and Stewards Association of the Pacific and the Pacific American Shipowners Association on behalf of respondent (Exhibits A-3 and A-4). The answer set forth the definition of the war risk areas as defined in these agreements, referring to the Pacific area as Area 4 (Aps. 28) as all points west of the 180th Meridian. Respondent's answer quoted the provision of the Marine Cooks & Stewards agreement (Ex. A-4, Aps. 29), providing for the payment of the bonus in the case of internment:

"In the event a vessel is interned, destroyed or or abandoned as a result of war operations and is unable to continue her voyage, * * *. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein * * *." (Aps. 29)

Respondent's answer sets forth that it paid the war bonus at the rate specified while "the libelants were in the war zone described in paragraph 1(a) of said agreements" (Aps. 30). The later statement is contrary to the stipulated facts, as the men were paid their war bonuses only up to the time of the destruction of the vessel, December 29, 1941, although there is no question but that the men subsequently remained in the area. This point is discussed in more detail hereafter.

There is nothing in the respondent's answer by way of affirmative defense that has any reference to any of the decisions of the Maritime War Emergency Board, or in any way alleges or charges that there was any authority on behalf of any person or organization to modify the agreements as set forth in the shipping articles. The substance of the answer simply sets forth the agreement as being made up of the shipping articles and the applicable supplemental agreements and full performance by respondent.

Under these pleadings the issue seems simple—so simple, in fact, that the libelants moved for judgment on the pleadings, in so far as it was admitted by the respondent in open court that the men were paid their war bonus only up to the date of the destruction of the vessel, and as to this fact there was no dispute, which motion was denied. The trial proceeded on these issues, and at the trial, as hereinabove set forth, respondent offered all of the evidence relating to negotiations prior and subsequent to the date of the articles in question, and the supplemental agreements, although there was absolutely nothing in the plead-

ings about any modification of the agreement as set forth in respondent's answer or any claim of ambiguity.

Even the witness Lintner, general manager of respondent, understood that the rider was to be interpreted and determined by the results of the negotiations which were under way at the time (Aps. 98). These are the admitted agreements. Lintner did not mean and said nothing about the M.W.E.B. decisions upon which the court decided the case.

Appellants objected strenuously to the introduction of all of this evidence upon the ground that it had no materiality. The court permitted its identification upon the promise by the respondent that it would be tied up and its materiality and relationship shown, and later admitted it all.

In an attempt to consider this mass of evidence and to follow the theory of the respondent, the court became confused, and finally admitted its confusion by stating:

"This is one of the most involved cases I ever saw. That is a condition resulting directly from the war situation and from the desire of citizens, particularly those connected with the maritime industry, to cooperate with the war effort, even to the exclusion of their clear understanding of employer-employee relations.

"It is the opinion of the court, however, that this case may be solved within the principles of contract law." (Aps. 32, 33)

The court then completely abandoned these principles, when it stated that to ascertain the intention of the parties from the articles and the two supple-

mental agreements, it was necessary to add the explanatory matter contained in the other evidence received by the court (Aps. 33).

The court wholly overlooked the provision in the rider signed by the men relating to the payment of bonus during internment, a specific provision covering a specific situation. It further overlooked the fact that in the first supplemental agreement, Exhibit A-3, the one covering the engine room personnel, the appellants Steeves, Calgan and Porter, that there was no provision whatever relating to the payment of bonus during internment. Further, the court assumed the fact that in the Marine Cooks & Stewards the payment of bonus during internment, the paragraph set forth in respondent's answer applied to both agreements—when in fact it was not the case. Respondent urged that the payments are limited to a "voyage."

This paragraph provided for the payment of a bonus to the men while in the war zone. Nothing is said about any voyage; nothing said about any services on the vessel. It simply provided that in the event of destruction of the vessel or the abandonment of the voyage, not only basic wages and emergency wages were to be paid, but war bonus was to be paid to the employees while they were in the war zones defined (Aps. 124). There is no dispute that during all of the period of their internment, until the men were homeward bound on the SS GRIPSHOLM and crossed the 180th Meridian, the men were continuously west of the 180th Meridian, placing them in the defined war zone.

By way of answer to the question which was in the court's mind concerning the authority conferred by the appellants to any person to modify or change their agreement subsequent to their signing of the articles, the court concluded that the various maritime unions had authority to act for the appellants and therefore could later modify the individual agreements; that these unions, by subscribing to the Statement of Principles (Ex. K), consented to be bound by the Decision of the Maritime War Emergency Board and thereby bound appellants. It is very difficult to understand how the court could arrive at this conclusion, because the Statement of Principles itself (Aps. 199), upon which the court based this conclusion, contained the following provision:

“It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and *all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated.*” (Aps. 200) (Italics supplied)

This is the portion of the Statement of Principles upon which the respondent relied when it urged to the court, in support of its exception to the original libel, that the Decisions of the Maritime War Emergency Board had no application.

The court, after concluding from respondent's Exhibit K that authority was granted to modify the libelants' rights, follows Decision No. 5, Revised, and grants to the men war bonus for the homeward bound voyage on the GRIPSHOLM under the terms of that decision (Aps. 34), making it clear that the court, relied entirely upon Decision No. 5, Revised, of

the Maritime War Emergency Board. And yet, if the court had read that decision, we can not see how it can completely ignore the provisions of that decision, dated Feb. 21, 1942, that would have no retroactive application if the subject matter was covered by a prior agreement. It provides:

“This Decision is retroactive to December 7, 1941, *in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's Articles entered into on or before January 23, 1942*, in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942, in the case of payments provided for in Article 4 hereof, and February 21, 1942, with respect to payments provided for in Article 6 hereof.” (Aps. 281)

Article 6 of this Decision is the one which specifically concerns the payment during internment. By virtue of this provision, no part of the decision applies as there was an agreement in the ship's articles prior to Jan. 23, 1942, in fact, prior to Dec. 7, 1941, the earliest date the decision could apply.

In other words, by the terms of this Decision itself the agreement of the libelants and the respondent as contained in the ship's articles was specifically excluded from its effect.

This argument by the appellants to the binding effect of collective bargaining agreements, referred to in Exhibit K, and the portion of Maritime War Emergency Board Decision No. 5, excluding its application where the matter was covered in the ship's articles, is no waiver by the appellants of their position that neither of these documents are admissible in evidence

under the general rules of evidence relating to contracts. It is called to this court's attention to show that even if these documents were admissible, by the very terms of the documents themselves, they have no application to the situation at bar.

By way of resume, we have this situation: The pleadings make no reference whatever to the extraneous matters, or allege any modification of the agreement. Therefore, by all the rules of pleadings, such evidence would not be admissible. Despite this, they are admitted by the court. Upon the admission of such extraneous matter, a contract, which without this extraneous matter is clear in its terms, becomes confused, because of the attempt of the court to consider this extraneous matter. Confusion is then confounded and the court loses sight of the substance of the improperly admitted evidence, the extraneous matter, and arrives at a decision contrary to the provisions of the erroneously admitted evidence.

The court was correct in its statement that this case could be decided within the principles of contract law. There is no ambiguity or uncertain terms in the rider and the supplemental agreements, and the fact that these contracts concern seamen and shipping articles does not affect the application of the ordinary rules of contract and evidence. As a matter of fact, a more liberal interpretation on behalf of seamen is required under the usual rules relating to controversies between seamen and the vessel.

Shipping articles are mercantile documents, and are entitled to liberal construction, in order to accomplish the purpose the parties had in mind. They

are not to be scrutinized as if they were legal pleadings.

United States v. Westwood (C.C.A. Va.)
266 Fed. 696.

The articles, being prepared by a master, should be construed liberally in favor of the seaman.

The Catalonia (D.C. Va.) 236 Fed. 554.

The construction most favorable to the seaman will be adopted in the case of ambiguity, uncertainty or obscurity in shipping articles.

Jansen v. Theodore Heinrich, Fed. Cases
7215.

Wope v. Hemmingway, Fed. Cases, 18042.

The Disco, Fed. Cases, 3922.

Even without these liberal rules of construction, the intention of the parties can be clearly ascertained from the written agreements signed by the parties. There is nothing in these agreements of a technical nature which requires interpretation. These agreements were prepared to express the intention of men of ordinary intelligence and their full intention can be ascertained from the shipping articles.

The admissibility of any evidence other than these agreements violates the parol evidence rule that all prior negotiations both oral and written, merge in the written agreement. Subsequent evidence is not admissible to change an agreement, unless the parties to the agreement have agreed to the subsequent changes or have specifically authorized other persons to make changes on their behalf. Certainly when such alleged subsequent changes result in a reduction of

the benefits to the parties to the original agreement, the existence of such authority will be critically examined.

The District Court had in mind, as appears from the record, the question of the authority of the union to make changes in the original agreement. While recognizing the question, the court overlooked the burden of proof cast upon the party who seeks to establish such authority to make subsequent changes. The mere fact of union membership is no such authority, and does not give the union officials the right to modify the agreement to the detriment of the men covered by the particular agreement. The rule is set forth in 31 Am. Jur. 874.

“Sec. 102. *Modification of Contract.*—It has been ruled that agreements between organizations of employees and their employers are not designed to place it within the power of the organization to change or modify the contract at pleasure, so as to affect injuriously the individual rights of its members thereof secured by the agreement. This ruling is predicated upon the theory that the officers of labor unions are not to be deemed the agents of the members, so as to be able to affect their individual rights. Nor is the submission of questions involving such rights contemplated by the agreement of members of a union to comply with its rules and regulations and with the will of the lawfully constituted majority.”

31 Am. Jur. 874, citing *Piercy v. Louisville & N. R. Co.*, 198 Ky. 477, 248 S.W. 1042, 33A.L.R. 322.

Our own Circuit Court has adopted this rule, hold-

ing that there can be no modification of working agreements by union officials, unless there has been express authorization to make such modification, and the burden of establishing such authorization is upon the person alleging the same.

“Whatever may have been the custom of the respondent in dealing with the other seamen and other fishermen on other occasions, and in other seasons, could not be binding upon the libelants who were not shown to have participated in similar dealings. * * *

“It must be shown that they were aware of the agreement before their conduct can be construed as a ratification of previously unauthorized agreement. The evidence does not show such knowledge.”

Ahlquist et al. v. Alaska-Portland Packers' Ass'n. (C.C.A. 9) 39 F.(2d) 348, 350.

In a question involving the application of an union agreement or by-laws to deprive an individual of certain rights against his employer, the court, in *The Henry S. Grove* (D.C. Md.) 22 F.(2d) 444, held this could not be done without express authorization or acceptance by the employee. In that case, however, the respondent sought to establish compensation insurance by reference to the by-laws of the local union of which libelant was a member.

“But, even assuming that libelant’s local did attempt by formal action of a majority of its members to bind them all to the agreement of the parent organization, the evidence as to which is by no means satisfactory, still the court does not think that libelant could thus be deprived of such a substantive right. An intention so to do will

not be presumed. *Burke v. Monumental Div. No. 52, B. of L. Engineers* (D.C.) 273 Fed. 707." (p. 446)

Let us examine the evidence objected to by the appellants, principally the exhibits, with direct relation to the issues raised by the pleadings and the rules above stated. First, we must bear in mind the date of October 11, 1941, which is the date the articles were signed and the date the written agreement between the parties was entered into.

What possible relevancy could there be to the issue here in demands submitted by the Masters, Mates & Pilots Association and the Marine Engineers Beneficial Association to the Pacific American Shipowners Association and the American Merchant Marine Institute, dated August 16, 1941 (Resp. Ex. A, Aps. 209). The Masters, Mates & Pilots and Marine Engineers and the American Merchant Marine Institute certainly are not parties to this proceeding. These demands, and we must assume from human experience that there were counter-demands and negotiations, resulted in an agreement dated Aug. 16, 1941, which was entered into between these two licensed officers associations and the two shipowners associations (Ex. B, Aps. 213).

Respondent saw fit to attach to this exhibit when it was offered in evidence an exhibit on the exhibit, identified as a letter from Admiral Land of the War Shipping Administration, to Mr. Taylor, president of the American Merchant Marine Institute, dated July 21, 1941 (Aps. 219), calling a conference in Washington, D. C., and the opening remarks of Com-

missioner McCauley (Aps. 221) at this conference. While interesting perhaps and informative, we fail to see where this exhibit could have the remotest relevancy or assist the court to determine what was the intention of the parties involved in this litigation when they signed the shipping articles in question at Portland, Oregon, on the 11th day of October, 1941.

At the same conference in Washington on August 12, 1941, the American Merchant Marine Institute and the Pacific American Shipowners Association submitted their own proposals concerning the bonus question to the licensed officers, both deck and engine room department (Ex. G, Aps. 242). If not merged into prior agreements, dated Aug. 16, 1944, certainly these proposals were merged into the agreement of the licensed officers, dated Oct. 10, 1941 (Ex. A-5, Aps. 259), which was introduced by the respondent.

The same situation is true of respondent's Exhibit H (Aps. 244), the proposals of the Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Association, which was dated September 15, 1941. These were merged into the agreement which was introduced and admitted without objection as being the supplemental agreement (Ex. A-3) referred to in the articles. In this Exhibit H, the marine firemen asked for \$10,000.00 insurance, they asked for bonus during internment, they asked for room rent while ashore, and made demands for a great many items which did not appear and were apparently abandoned at the time the ultimate agreement (Ex. A-3) was entered into.

Respondent's Exhibit C attached to Mullins Deposi-

tion (Aps. 223), dated August 18, 1941, is a circular letter addressed to the members of the American Merchants Marine Institute setting forth the views of Mr. Frank J. Taylor and the results of the conference theretofore held in Washington, D. C., with the licensed officers associations. We fail to see by what processes of imagination there could be anything in that letter that would be binding upon the libelants, West Coast seamen, who signed a contract approximately two months later or have any bearing on their intentions at that time.

Respondent offered and the court admitted Decision No. 80, of the National Defense Mediation Board (Ex. D, Aps. 226), which decided a specific controversy, not between any of the libelants or the respondent, but between various steamship companies and their licensed personnel represented by their unions and the Sailors Union of the Pacific, no parties to this proceeding either directly or by representation. And the result of this hearing is what? A decision? No! The board hands down certain recommendations. The board recommends certain rates of bonus in certain areas. Nowhere in this document is there one word concerning the payment of a war bonus in the event of the internment of the crew of a vessel. The dispute in the case at bar concerns only the question of the payment of the bonus during internment, not the rate at which it will be paid. That rate has been stipulated. Therefore, what is the materiality of Decision No. 80? None whatever!

Let us examine some of the documents and evidence which were introduced which came into being after

October 11, 1941. The articles signed on October 11, 1941, fix the rights of the parties thereto, unless they consent or directly delegate to others the right to subsequently modify the agreement. At the time the first of these exhibits, Resp. Ex. K (Aps. 199), the Statement of Principles, was signed, the appellants were on the other side of the world. It was the impact of the war, Pearl Harbor, an occurrence which arose after the agreement was signed, and which might fairly have been said to have been contemplated within the agreement, that brought most of these exhibits into being. The rider, dated October 11, 1941, was signed with the understanding that there was a definite risk of war, and certainly was not signed with the intention that if there was a war, the rights of the men signing such document would be diminished by delegating to others the power to make such agreements for them.

Exhibit K (Aps. 199), adopted December 17, 1941, was the one upon which the court placed such great emphasis in its decision. Despite the most strenuous objection by appellants' counsel, and even despite the argument by respondent's counsel on the point of the Wagner Labor Relations Act (Aps. 95) (which was further confusing) the court admitted this exhibit. There is not one bit of evidence in the record, other than counsel for respondent's own statement, that appellants authorized their union representatives to change their agreement after they sailed. We challenge counsel to point out evidence of such authority. The mere fact of union membership alone is not such authority. The court recognized this (Aps. 95) and

yet unfortunately assumed, without any record to support the assumption, that such authorization in fact existed. At the time of these negotiations and the adoption of the Statement of Principles, the men were at sea and in fact had already discharged part of their cargo at Manila.

This very document itself shows that it is prospective in its operation. Without waiving the right to strike, Maritime labor gives the Government assurance that the exercise of this right will be withheld for the period of the war (Aps. 199) and

“To provide machinery for the settlement of disputes without interruption of service or stoppage of work during the period of the war and to insure the application of the maximum war effort * * *.” (Aps. 200)

This exhibit also provides that the unions representing the personnel of the American Merchant Marine and the operators of those vessels have pledged themselves to cooperate wholeheartedly in the all-out war effort of the government, and to take no action during the war emergency which shall cause any interruption of the service of such vessels (Aps. 201).

Not only was there no authority within this Statement of Principles, dated December 17, 1941, to make any change in any pre-existing agreement, the agreement itself was very careful to protect the prior rights that had already been fixed as the result of agreement:

“It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and all

agreements and obligations arising as a result of collective bargaining agreements will in no way be violated." (Aps. 200)

In the light of this statement in the agreement itself, we cannot conceive how the district court made such an error. Even respondent adopted the position that this agreement did not apply when it used the above section to maintain the validity of the supplemental agreements (Resp. Ex. A-3 and A-4) to prevent an increase in the payment of the bonus set forth in those agreements on his exceptions to the original libel.

The court, having fallen into this error, then assumed that Decision No. 5, Revised (Ex. A-11, Aps. 279) applied. Again, we have the question of time involved. This decision was dated February 21, 1942, when the libelants had been in prison for almost two months. (We have already referred in our Statement of the Case to the fact that by the very terms of Decision No. 5, Revised, Exhibit A-11, all persons in possession of original Decision No. 5, and attached supplements, Exhibit A-12 (Aps. 287) were requested to destroy the same and they were to be of no effect as superseded by Decision No. 5, Revised). There is no evidence in the record where the libelants in this case, or any member of the crew of the SS CAPILLO, authorized the Maritime War Emergency Board to act for them. Even were it admissible on the theory that there was some authority, had the court read these exhibits we cannot understand how it failed to consider that portion of both decisions No. 5, either in the original form or revised form, which provided

that they were only retroactive to December 7, 1941 (yet the articles were signed on October 11, 1941), and retroactive only in those cases where there was no agreement with respect to the subject matter of Decision No. 5 prior to the 21st day of February, 1942.

“This Decision is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's Articles entered into on or before January 23, 1942, in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942, in the case of payments provided for in Article 4 hereof, and February 21, 1942, with respect to payments provided for in Article 6 hereof.” (Aps. 281)

We believe that there can be no question on the conclusion that not only was there no authority to make any subsequent change, but all of the documents offered by the respondent and upon which respondent relies disclose a positive intention, by specific reference thereto, that the rights and privileges arrived at in prior agreements would not be changed or modified.

As far as Maritime War Emergency Board Decision No. 2 is concerned (Ex. A-2, Aps. 270), we have been unable to find one word therein which has any relation to the question of the payment of bonus during internment, which is the only issue here. This exhibit is wholly devoid of any materiality both as to the question of time when it was issued and in substance.

Exhibits A-5 (Aps. 259), A-6 (Aps. 265), A-7 (Aps. 266) and A-8 (Aps. 266) were supplemental

agreements with other unions than those representing the libelants. These agreements covered, respectively, the licensed deck officers, the licensed engine room personnel, the deck crew and the radio operators. None of the appellants are members of these groups. Even the respondent does not content that they had any connection with the other unions or that the unions had any authority to act for them. We might as well introduce the agreement between the long-shoremen and their employers in the Port of San Francisco establishing an increase in pay and an agreement they would not strike during the war. Such agreement has a direct relationship to the war effort and is maritime in nature, but that does not make it material to the situation in the case at bar.

The only other of respondent's exhibits not discussed are Exhibit E (Aps. 231) and Exhibit F (Aps. 236), these two being supplemental agreements between the American Merchant Marine Institute, representing some of the Atlantic Coast operators, and the National Maritime Union. Exhibit E relates to the payment of war bonuses, being dated November 6, 1941, and being only the blank form of an agreement between the N.M.U. and unnamed operator. Exhibit F relates to the payment of a war bonus for a trip to Russia, also in blank form.

The appellants and all members of the crew of the SS Capillo, being West Coast men, were not only not represented by the National Maritime Union, but were in fact in conflict with that union and they were rival unions. What place do these documents have in this proceeding, and how could they be of any value in

determining the intention of the parties in the articles on the Capillo?

We do not feel it necessary to discuss the testimony of the witnesses Mullins and Bryan, as most of the testimony relates to the identity of the exhibits herein referred to. Suffice it to say that neither of these estimable gentlemen had anything to do with either the appellants or the respondent in the transaction in the signing of the articles, out of which the appellants' claim arose. While the efforts of these gentlemen in the support of the war effort by keeping labor relations of their respective associations on an even keel deserve commendation, such efforts can hardly be of assistance to the court in determining the issues involved in this proceeding.

We have not referred to the general rule that master agreements entered into between a union and an association or representatives of employers are not of themselves binding until incorporated or adopted by specific agreement between the employees and a particular employer.

"The initial agreement itself acquired no legal force until the parties directly and immediately concerned contracted with reference to it. Until closed by specific acceptance on the part of the parties so concerned, the agreement remained incomplete. *Rentschler v. Missouri Pac. R. Co.*, 126 Neb. 493, 253 N.W. 694, 95 A.L.R. 1; 31 Am. Jur. 872, Labor, §97.

Clark v. Claremont Apt. Hotel Co., 19 Wn. (2d) 115, 122, 123, 141 P.(2d) 403.

The reason therefore is that no question has been

raised, either by the pleadings or by counsel on the application of the supplemental agreement, which is the only general agreement which is effective in the case at bar (Exhibit A-3 and A-4). Respondent has stipulated to this fact. We feel that the reference to such cases is not necessary in view of the fact that there are not other collective bargaining *agreements* between the union and members of the crew involved in these proceedings other than the two agreements mentioned.

The appellants recognize that a trial court, sitting in admiralty, has a wide latitude in the admission or rejection of evidence, but even within this latitude the rules of relevancy and materiality must be followed. These rules must be applied with relation to the particular issues before the court. That the court committed error in permitting the evidence objected to to be introduced, we feel, is clearly apparent.

.

CONCLUSION

This is a contract, as set forth in the libel, which is made up of three documents, and no more; the shipping articles including the rider, Exhibit A-3, supplemental agreement for the engine room department, covering Steeves, Calgan and Porter, and Exhibit A-4, the Marine Cooks and Stewards supplemental agreement covering Taylor. The intention of the parties, as set forth in these documents, is clear. They provide for the payment of bonus during internment.

The facts are admitted: that no bonus was paid to the men during their period of interment. The judgment should be reversed, with instructions to enter a decree in favor of each appellant for the payment of bonus at the rate of \$80.00 per month from the 29th day of December, 1941, to the 7th day of December, 1943, the date of their arrival on a Pacific Coast port after leaving New York, and \$125.00 for each appellant, the stipulated value of the transportation from New York to the Pacific Coast.

Respectfully submitted,

SAM L. LEVINSON,

Proctor for Appellants.



APPENDIX

[Title of District Court and Cause]

ASSIGNMENTS OF ERROR (Aps. 54 to 72)

The appellants, Edward J. Steeves, Hugo Calgan, William A. Porter and Samuel S. Taylor, hereby assign as error in the proceedings, decree, orders and decision of the District Court in the above entitled action, as follows:

(1) The District Court erred in entering Finding of Fact III upon the grounds that such finding is immaterial and irrelevant to the issue, and there was no competent evidence to support said finding.

(2) The District Court erred in entering Finding of Fact IV on the grounds that said finding is immaterial and irrelevant, and there is no competent evidence to support said finding.

(3) The District Court erred in entering Finding of Fact V upon the grounds that such finding is immaterial and irrelevant to the issue, and that there is no competent evidence to support said finding.

(4) The District Court erred in entering Finding of Fact VI, on the grounds that said finding is immaterial and irrelevant.

(5) The District Court erred in entering Finding of Fact VII, on the grounds that said finding is immaterial and irrelevant.

(6) The District Court erred in entering Finding of Fact VIII, on the grounds that said finding is immaterial and irrelevant.

(7) The District Court erred in entering Finding of Fact IX, except that portion of said Finding of Fact which states that supplementary agreements were entered into between the Pacific American Ship-owners' Association and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and the Marine Cooks and Stewards Association, dated October 9, 1941, and October 10, 1941, respectively, on the grounds that said finding is immaterial and irrelevant, and not supported by competent evidence.

(8) The District Court erred in entering Finding of Fact X, upon the grounds that the same is immaterial and irrelevant, and that said finding is not supported by competent evidence.

(9) The District Court erred in entering Finding of Fact XI, upon the grounds that the same was immaterial and irrelevant, and that said finding is not supported by competent evidence.

(10) The District Court erred in entering Finding of Fact XII, except that portion of said finding which states that the respondent has paid libelants bonus at the rate of \$80.00 per month from December 7, 1941, to December 29, 1941, upon the grounds that said finding is immaterial and irrelevant and not supported by competent evidence, and contains an erroneous determination of the amount due the libelants.

(11) The District Court erred in entering Conclusions of Law I, II and III.

(12) The District Court erred in entering the Decree awarding each of the libelants the sum of \$288.00.

(13) The District Court erred in failing to enter a decree in favor of the libelant Steeves in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, in failing to enter a decree in favor of the libelant Calgan in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, in failing to enter a decree in favor of the libelant Porter in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, and in failing to enter a decree in favor of the libelant Taylor in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, and costs in favor of the libelants.

(14) The District Court erred in admitting in evidence respondent's Exhibit "K" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit was a document entitled "Statement of Principles," and was adopted at a conference of representatives of steamship companies and maritime unions held in Washington, D. C., December 19, 1941. This exhibit, in substance, provided that it was desirable and necessary that a uniform basis of war bonus and insurance covering the entire maritime industry be reached; that maritime labor give its assurance to the United States Government that they will not strike during the period of war; and steamship companies agree there will be no lock-out; that the utilization of collective bargaining will not be impaired by reason of any act of the conference; that all agreements and

obligations arising out of collective bargaining will not be violated; to provide machinery for the settlement of disputes without interruption of service or stoppage of work during the period of war, and to insure application of the maximum war effort; providing for the creation of a proposed maritime war emergency board with the powers set forth in Exhibit "A" attached to said exhibit. Exhibit "A" attached provides that the unions and the vessel operators, having pledged themselves to co-operate in the war effort, it is of importance that means shall be established to insure that questions that may arise which are likely to interrupt the war effort, shall be settled promptly.

Under present conditions, in order to afford a procedure for settling questions relating to war risk compensation and insurance it is proposed there shall be established a board to be known as the Maritime War Emergency Board, which shall consist of three members named by the President. Disputed questions of war risk compensation shall be referred to the Board, and upon notice and hearing, its decision shall be final. Advisory committees of steamship operators and unions are set up. Pursuant to this agreement, on December 19, 1941, President Roosevelt appointed John R. Steelman, Edward Macauley and Frank P. Graham to constitute the Maritime War Emergency Board.

(15) The District Court erred in admitting in evidence respondent's Exhibit "A-5" over libelants' objection that the same was immaterial and irrelevant.

Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-5" was a document dated October 10, 1941, being a supplementary agreement between the Master, Mates and Pilots Association, West Coast Local 90 (representing licensed deck officers), and the Pacific Shipowners Association. This agreement designated the war areas and provided for payment to members of the Masters, Mates and Pilots Union of war bonus, at designated rates, and for the payment of bonus during such time as the members of the union were in the war zone. None of libelants were members of this union.

(16) The District Court erred in admitting in evidence respondent's Exhibit "A-6" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-6" was a document dated October 15, 1941, being a supplementary agreement between the Marine Engineers Beneficial Association (the union representing the licensed engineer officers), and the Pacific Shipowners Association. This agreement designated the war areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of the libelants were members of this Association.

(17) The District Court erred in admitting in evidence respondent's Exhibit "A-7" over libelants' objection that the same was immaterial and irrelevant.

Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-7" was a document dated October 16, 1941, being a supplementary agreement between the American Communications Association representing the radio operators and the Pacific Shipowners Association. This agreement designated the areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of libelants were members of this association.

(18) The District Court erred in admitting in evidence respondent's Exhibit "A-8" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-8" was a document dated October 9, 1941, being a supplementary agreement between the Sailors' Union of the Pacific and the Pacific Shipowners' Association. This agreement designated the war areas and provided for the payment of war bonus during such time as the members of the S. U. P. were in the war zone. None of the libelants were members of the S. U. P.

(19) The District Court erred in admitting respondent's Exhibit "A-10" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Respondent's Exhibit "A-10" was a copy of Decision No. 2 of the Maritime War Emergency Board, dated January 10, 1942, containing classification of

bonus areas and the rate of bonus. Six classifications were established with appropriate bonus rates, and also providing for the payment of certain port bonuses. Nothing in this exhibit relates to the payment of bonus during internment.

(20) The District Court erred in admitting respondent's Exhibit "A-11" over libelants' objection that it was immaterial and irrelevant, which objection was overruled, and exception allowed.

This exhibit is Decision No. 5 Revised of the Maritime War Emergency Board, dated February 1, 1942, requesting that all persons in possession of the previous Decision No. 5, and the supplements hereinafter referred to as Respondent's Exhibit "A-12," destroy the same, and this revised Decision No. 5 sets forth the new procedure whereby the owner or operator of the vessel shall pay the dependents of seamen during internment the amounts which have been allotted to said dependents. This Revised Decision No. 5 provides that it is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the payments provided for or contained in the ship's articles entered into on or before February 21, 1942, with respect to payment of bonus during internment, or where the making of such payments was expressly left open subject to a later agreement either in the ship's articles or collective bargaining. This decision substantially follows Exhibit "A-12" in that it sets forth the procedure of payment of wages to either the members of the crew or their dependents during the period of internment, and provides similarly that war bonus shall continue from the time of the loss of the

vessel until the seaman arrives at the port where he is no longer exposed to marine perils, and is subject to the retroactive provisions hereinabove set forth.

(21) The District Court erred in admitting respondent's Exhibit "A-12," to which libelants objected on the ground that the same was immaterial and irrelevant, which objection was overruled, and exception allowed.

Exhibit "A-12" was denominated Maritime War Emergency Board Decision No. 5, and supplements. This exhibit sets forth the procedure whereby an owner or operator of a vessel, sunk by enemy action, shall pay to the seaman, or his dependents, wages and allotments during internment of the seaman. It defines certain classes of dependents which shall receive such allotment in the event no allotment has been made by the seaman. Supplement dated February 6, 1942, provides that the Decision shall be retro-active to December 7, 1941, and further provides that the seaman shall have the right to agree with the ship owner that such seaman shall be paid wages during the period of internment, through the medium of the American Red Cross, or other governmental agency. Amendment to Decision No. 5, also part of this exhibit, dated February 17, 1942, re-states that Decision No. 5 clearly covers vessels in the American Merchant Marine which are sunk or damaged by enemy action, or the destruction of such vessel by any of the United Nations. This amendment sets forth that the Board has given consideration to the continuance of bonus in case of destruction of the vessel, which subject was not covered by Decision No. 5, and adds a number of articles to

Decision No. 5, designating the same as Article No. 6, and providing that where such vessel is lost as the result of enemy action, the war bonus shall continue at the rate which prevailed immediately before loss until the seaman arrives at a port where he is no longer exposed to marine perils. This further provides, however, that the provision of the supplement to Decision No. 5 providing that the terms of the decision shall be retro-active to December 7, 1941, shall be applicable only where there was no agreement with respect to the making of payments provided for or contained in the ship's articles entered into on or before January 10, 1942.

(22) The District Court erred in admitting in evidence respondent's Exhibit "B," Mullins' Deposition over objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Exhibit "A," Mullins' Deposition, was a written proposal by the Masters, Mates and Pilots Association and the Marine Engineers' Beneficial Association, submitted to a conference called by the United States Maritime Commission and the Department of Labor in July and August, 1941, between the American Merchant Marine Institute, representing the Atlantic coast vessels, and the Pacific-American Shipowners' Association, representing the Pacific coast vessels, and the two unions above referred to. This proposal sets forth their demands for bonus in various war areas and the proposed war risk insurance policies covering their members.

(23) The District Court erred in admitting in evidence respondent's Exhibit "B," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit was the agreement entered into on August 16, 1941, between the Marine Engineers' Beneficial Association and the Masters, Mates and Pilots Association and the American Merchant Marine Institute and the Pacific American Shipowners' Association covering the proposed bonuses and wages for the war risk areas defined therein. This exhibit also included a copy of a letter from Admiral Land to Mr. Frank J. Taylor, President of the American Merchant Marine Institute, dated July 22, 1941, calling a conference. The exhibit further included the opening remarks by Admiral McCauley to the members of the conference at the time of their meeting on August 12, 1941, and a request by them to further the war effort.

(24) The District Court erred in admitting Exhibit "C," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. This objection was overruled, and exception allowed.

This exhibit was a form letter from the Secretary of the American Merchant Marine Institute, dated August 18, 1941, addressed to its members, advising them of the result of the meetings with the Masters, Mates and Pilots and Marine Engineers, and the negotiations and agreements entered into between them.

(25) The District Court erred in admitting Exhibit

"D," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a copy of the decision of the National Defense Mediation Board Decision No. 80 of hearings held on September 29th and October 1st, 2nd, 3rd and 4th, 1941, in which the American Merchant Marine Institute, Pacific American Ship-owners Association, Waterman Steamship Corporation, parties on the one side, and the Seafarers' International Union of N. A. and the Sailors' Union of the Pacific were opposing parties. This resulted in certain recommendations by the Board, which, in substance, were as follows: That the crews of American vessels perform an essential role in the national war effort, and that a number of named shipping companies are associated in the American Merchant Marine Institute and the West Coast companies are associated in the Pacific American Shipowners' Association, and the Waterman Steamship Company is not affiliated with either group; that the unlicensed personnel are represented by the S. I. U. and the S. U. P.; that collective bargaining relationships have been established by most owners and one or another of the unions, and for the negotiation of general contract the parties have worked out among themselves appropriate methods. However, a special problem arises from the risk run by men who go to sea in time of war, and it was with this problem that the recommendations are concerned. To cover the bonus which would be fair under present conditions and provide machinery for equitable future bonus, if conditions change, the National Defense

Mediation Board recommends, until changed, bonus rules based on five war risk areas as defined therein, with a further provision that able-bodied seamen shall be paid a bonus of \$80.00 per month in the first four areas and \$33.00 a month in the fifth area. The fourth area covers the trans-Pacific route. Provision is also made for port attack bonuses. The Board further recommends the following machinery for making equitable future adjustment: Any signatory may ask for a change, such request to be made in writing to the other party for whom change is sought, and if an agreement is not reached within one week, the matter be referred to the United States Department of Labor, Division of Conciliation; if not then determined, it may be referred to a Board composed of three members appointed by the President, and such Board shall have power to make recommendations. It further provides that the recommendations relating to the bonus areas shall be effective to November 1, 1942, and that an amendment to November 1, 1943, and during this period there shall be no strike. It is further set forth that nothing in these recommendations shall be interpreted to reduce benefits now existing under collective bargaining contracts, and all the recommendations shall become effective on ships that sail after August 16, 1941, or any earlier effective date set by special rider. If any dispute arise as to the interpretation or recommendations and the parties cannot adjust that dispute by collective bargaining, either party may avail themselves of the arbitration conciliation provisions provided in the recommendations.

(26) The District Court erred in admitting Exhibit "E," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a blank form of supplementary agreement between the National Maritime Union and the name of the company left in blank, bearing date November 6, 1941, which set forth the bonus areas and the rates of bonus.

(27) The District Court erred in admitting Exhibit "F," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a supplementary agreement in blank between the National Maritime Union and unnamed companies, bearing date December 12, 1941, concerning bonus areas and bonus rates.

(28) The District Court erred in admitting respondent's Bryan Deposition-Exhibits "A," "B" and "D" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Bryan Deposition-Exhibits "A," "B" and "D" are the same documents heretofore referred to as Mullins' Deposition-Exhibits "A," "B" and "D," respectively.

(29) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "G" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

This exhibit was the written counter-proposal, dated August 12, 1941, made by the Pacific American Shipowners' Association and American Merchant Marine Institute to the demands of the two unions representing the licensed personnel, which negotiations and conference resulted in a contract heretofore referred to as Respondent's Exhibit "B." These proposals defined the various war risk areas and the bonuses to be paid, and provided for a \$5000.00 war risk insurance for loss of life. This proposal suggested the payment of wages during the period of internment until the officer arrives at a Continental United States port.

(30) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "H" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Bryan Deposition-Exhibit "H" was the war bonus proposal of the Pacific Coast Marine Firemen, Wassertenders and Oilers' Association, dated September 15, 1941, setting forth proposed war bonus areas and the rates to be paid in those areas, requesting war risk insurance, and requesting payment of wages and bonuses in the event of internment until the men arrived at a continental United States port. Requests were also made for insurance on personal effects and for certain meal benefits while awaiting transportation.

(31) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "I" over libelants' objection that it was immaterial and irrelevant. Li-

libelants' objection was overruled, and exception allowed.

This exhibit is a copy of a letter from the Sailors' Union of the Pacific, dated September 10, 1941, directed to the Pacific American Shipowners' Association, setting forth their reasons for a proposed amendment to the current war bonus provisions and submitting certain bonus demands covering particular areas, including a request for the payment of bonus until the member of the union is returned to a home port, and also requesting certain war risk insurance on personnel and property of personnel, as well as increased wages by reason of carrying war cargo.

(32) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "J" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a letter from the Marine Engineers' Beneficial Association, dated October 24, 1941, directed to the American Merchant Marine Institute, calling attention to certain differences in the bonus provisions in the agreements entered into on the Atlantic Coast between the Marine Engineers' Beneficial Association and the American Merchant Marine Institute and the Pacific American Shipowners' Association on the Pacific Coast.

(33) The District Court erred in admitting the testimony of the witness Mullins by deposition over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, to which libelants excepted, and exception allowed.

The witness Mullins testified that he was secretary of the American Merchant Marine Institute which is composed of vessel operators of the Atlantic Coast, and that as such he participated in and identified the documents hereinabove referred to in connection with the negotiations conducted between the American Merchant Marine Institute and the National Maritime Union, such negotiations taking place prior to the execution of the shipping articles and rider under which the libelants were employed. The witness also identified and testified concerning the letters written by the American Merchant Marine Institute to its members advising them of the result of the negotiations. He identified National War Labor Mediation Board Decision No. 80, and testified concerning the hearings.

(34) The District Court erred in admitting in evidence the testimony of the witness J. B. Bryan by deposition over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

The witness Bryan testified that the Pacific American Shipowners' Association, formed in 1936, acted in labor relations matters between its members and seafaring unions; that commencing in 1939, collective bargaining agreements contained special settlement of war bonus; that because of confusion arising between separate agreements entered into by the various companies following a series of conferences held in Washington, D. C., a uniform agreement with the unions representing the licensed personnel was entered into. Bryan participated in these negotiations,

which were preceded by written demands made by these two unions, which he identified and which were admitted as above set forth. He also identified the same documents testified to by William Mullins in his deposition. He identified the written demands made by the Radio Operators Association, and demands made by the Sailors' Union of the Pacific dated September 16, 1941. He testified concerning the hearing in Case No. 80 before the National Defense Mediation Board covering the general subject matter of war risk and war bonus, which hearing was held in October, 1941, and which resulted in certain written recommendations by the Board. He identified the dates upon which supplementary agreements were entered into between the Pacific Shipowners' Association and the six unions representing sea-going personnel, and testified concerning communications between the Pacific Shipowners' Association and the American Merchant Marine Institute about the possible differences in the language of the contracts, and identified a letter dated October 24, 1941, referred to in Bryan Deposition-Exhibit "J" concerning such differences.

EDWARD J. STEEVES,
HUGO CALGAN,
WILLIAM A. PORTER,
SAMUEL S. TAYLOR,
Appellants,

By SAM L. LEVINSON,
Their Proctor.

[Endorsed]: Filed June 15, 1945.

No. 11100

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,

Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

**BRIEF OF APPELLEE
AMERICAN MAIL LINE LTD.**

FILED

NOV 10 1945

JOHN AMBLER,

GROSSCUP, AMBLER & STEPHAN,

Proctors for Appellee.

807 Central Building,
Seattle 4, Washington.

PAUL P. O'BRIEN
CLERK

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE
AMERICAN MAIL LINE LTD.

JOHN AMBLER,
GROSSCUP, AMBLER & STEPHAN,
Proctors for Appellee.

807 Central Building,
Seattle 4, Washington.

INDEX

Page

Introductory Facts	1
Recovery Sought by Amended Libel.....	3
Recovery Allowed by Trial Court.....	4
The Shipping Articles of the "Capillo".....	4
The Rider to the Shipping Articles.....	5
The Orgin of the Rider.....	7
"Agreements" and "Supplementary Agreements" Mentioned in the Rider	7
Basic Agreements	8
Supplementary Agreements	9
First Supplementary Agreements of 1940.....	9
Second Supplementary Agreements of Febru- ary 10, 1941	9
Third Supplementary Agreements of May 19, 1941	10
State of Negotiations on New Supplementary Agreements Unknown to Parties When "Ca- pillo" Sailed	11
Developments in Collective Bargaining on War Compensation Following Execution of Supple- mentary Agreements of May 19, 1941.....	12
The August Conference and Negotiations.....	16
The Contract of August 16, 1941.....	17
Further Developments in Labor Negotiations on War Compensation on Pacific Coast Until "Pearl Harbor"	22
Further Developments in Labor Negotiations on War Compensation on Atlantic Coast Until "Pearl Harbor"	25
Further National Developments on War Compen- sation Following "Pearl Harbor".....	27
Decisions of the Maritime War Emergency Board..	28
Argument	31
Admissibility of surrounding circumstances in construction of ambiguous contract.....	31

Argument	Page
Which supplementary agreements are incorporated by the rider?	32
Are supplementary agreements of May 19, 1941, incorporated?	33
Are supplementary agreements of October, 1941, incorporated by the rider?.....	37
History of clause in October supplementary agreements providing that in case of loss or internment of vessel war bonus was to be paid " <i>While employees are in the war zones defined herein</i> "	38
What is a "war zone" as "defined" in the October supplementary agreements?	40
Are decisions of Maritime War Emergency Board incorporated?	48
Comments on Brief of Appellants	52
No dispute in facts	52
Provisions of October supplementary agreements covering "marine cooks," "marine firemen" and "sailors" are identical save for the general introductory paragraphs	52
Exhibit A-12 emphasizes consideration given by Maritime War Emergency Board to <i>existing</i> collective bargaining agreements	53
Date of decision in Case No. 80 of National Defense Mediation Board	55
The agreement of August 16, 1941, was changed by Exhibits A-5 and A-6	56
Rider will be interpreted to carry out the <i>general intent</i> to make supplementary agreements controlling	56
War bonus — wages or not.....	60
The rider is valid where it incorporates a <i>negotiated</i> agreement even if subsequently made..	60
Under October supplementary agreements bonus only payable while employees are in the "war zones defined herein"	61

Page

Decision No. 5, Revised, of Maritime War Emergency Board covers the subject matter when same is left open for <i>future</i> agreement.....	62
Rider to be construed against those who proposed and presented it	63
Previous negotiations of the parties are admissible in interpreting the rider.....	65
Authority of union to modify the contract.....	66
Invitation to the conference of August 12, 1941, and the introductory remarks of Commissioner Macauley are part of contract of August 16, 1941	69
Circular of American Merchant Marine Institute, Inc.	70
Later general agreements are expressly incorporated by the rider	71
Conclusion	72
Appendix—October supplementary agreement covering “marine cooks” — Appellee’s Exhibit A-4 (119)	following page 73

TABLE OF CASES

<i>Ahlquist et al. v. Alaska-Portland Packers’ Ass’n</i> (C.C.A. 9) 39 F.(2d) 348.....	66
<i>Alaska S.S. Co. v. U.S.</i> , 290 U.S. 256.....	6
<i>American Mail Line v. U.S.</i> , 59 F. Supp. 921.....	6
<i>J. I. Case Co. v. National Labor Relations Board</i> , 321 U.S. 332	67
<i>The Catalonia</i> (D.C., Va.) 236 Fed. 554.....	63
<i>Clark v. Claremont Apt. Hotel Co.</i> , 19 Wn.(2d) 115, 141 P.(2d) 403.....	71
<i>The Disco</i> , Fed. Cases, 3922.....	63
<i>Dorsey v. Strand</i> , 21 Wn.(2d) 217, 150 P.(2d) 702	64
<i>The Edna</i> , 291 Fed. 379.....	6
<i>The Edna</i> , 292 Fed. 640.....	6
<i>Flotation Systems v. United States</i> (9 C.C.A.) 136 F.(2d) 483	64

	<i>Page</i>
<i>Foss v. Golden Rule Bakery</i> , 184 Wash. 265, 51 P. (2d) 405	64
<i>Franklin Fire Co. v. Hanney</i> (C.C.A. 9) 149 F. (2d) 150	32
<i>Grove, The Henry S.</i> (D.C., Md.) 22 F. (2d) 444....	66
<i>Horluck v. Beal</i> (1916) A.C. 486.....	6
<i>The Howick Hall</i> (D.C. La.) 10 F. (2d) 162.....	61
<i>Hyland v. Oregon Co.</i> , 74 Ore. 1, 14 Pac. 1160.....	64
<i>Jansen v. Theodore Heinrich</i> , Fed. Cases 7215.....	63
<i>Jensen v. Franklin</i> (10 C.C.A. 1934) 74 F. (2d) 501	45
<i>Jones v. United States</i> (D.C. Md.) 284 Fed. 721.....	61
<i>Linde Dredging Co. v. Southwest Co.</i> (5 C.C.A.) 67 F. (2d) 969	58
<i>Marx v. American Malting Co.</i> (6 C.C.A.) 169 Fed. 582	58
<i>Midland Valley R. Co. v. Railway Express Agency</i> (10 C.C.A. 1939) 105 F. (2d) 201.....	45
<i>Minnesota Tribune v. Associated Press</i> (8 C.C.A.) 83 Fed. 350	58
<i>Mobile & Montgomery Co. v. Jurey</i> , 111 U.S. 584..	32
<i>Northern Pacific v. Twohy Bros.</i> (9 C.C.A.) 95 F. (2d) 220, cert. den. 304 U.S. 575.....	65
<i>Pringle v. Wilson</i> , 156 Calif. 313, 104 P. (2d) 316, 24 L.R.A. (N.S.) 1090.....	45
<i>Saratoga</i> , Fed. Cas. 12,355.....	6
<i>Southern Railway Co. v. Coco Cola</i> (4 C.C.A.) 145 F. (2d) 304	64
<i>Teiser v. Swirsky</i> , 137 Ore. 595, 2 P. (2d) 920.....	32
<i>Union Water Co. v. Lewiston</i> , 101 Me. 564, 65 A. 67	57
<i>United States v. Westwood</i> (C.C.A., Va.) 266 Fed. 696	63
<i>Vance v. Ingram</i> , 16 Wn. (2d) 399, 133 P. (2d) 938	32
<i>Wope v. Hemmingway</i> , Fed. Cases, 18042.....	63

TEXTBOOKS

	<i>Page</i>
12 Am. Jur. 761	45
12 Am. Jur. 779	57
12 Am. Jur. 784.....	32
12 Am. Jur. 795	64, 65
31 Am. Jur. 874	66
1942 A.M.C. 308	9, 28
1944 A.M.C. 1020, 1023.....	52
1944 A.M.C. 1022	49
1945 A.M.C. 1176, 1182.....	52
1945 A.M.C. 1176, 1182.....	31
Funk & Wagnalls New Standard Dictionary.....	42
Maritime War Emergency Board Weekly Bulletin	
No. 12. March 6, 1943. Ruling No. 8.....	30
Weekly Bulletin No. 17, April 10, 1943. Ruling	
No. 4	30
Parsons on Shipping and Admiralty, Vol. 2, p. 63..	6
Restatement of the Law of Contracts: §228.....	65
§230.....	32, 65
§235 (d).....	32
§236 (d).....	64
§242.....	32, 65
Williston on Contracts, Revised Edition, §619.....	57
Webster's New International Dictionary.....	42

STATUTES

46 U.S.C. 564	60
46 U.S.C. 593	6

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WIL-
LIAM A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE LTD., a corpora-
tion,
Appellee.

No. 11100

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE
AMERICAN MAIL LINE LTD.

INTRODUCTORY FACTS*

The American Steamship "CAPILLO" was a vessel owned by the United States Maritime Commission. In 1941 she was under bareboat charter to American Mail Line Ltd., and was operated by that company in the trans-Pacific cargo trade between North American Pacific Coast ports and the Philippine Islands via various Oriental ports.

On October 11, 1941, the master of the "CAPILLO" signed Shipping Articles with his crew at Portland,

*All emphasis in quotations, unless otherwise indicated, is supplied. References in (....) are to pages in Apostles on Appeal.

Oregon, for a customary voyage. Just before the vessel sailed from the mouth of the Columbia River on her projected voyage, her routing, due to unsettled conditions in the Pacific, was unexpectedly assumed by the United States Navy. She was ordered to proceed direct to Honolulu, T. H., and from there via a circuitous course direct to Manila, P. I., thus omitting her scheduled calls in China. The vessel in compliance with Navy orders arrived at Manila November 28, 1941. Unable to discharge her cargo, she remained in that port under orders of the United States Government until December 29, 1941, when she was sunk by bombs from Japanese aircraft (35,36, 81). Fortunately her crew suffered no casualty, but soon thereafter they were interned by the Japanese.

The appellants, two oilers, a fireman and a messman, of the crew of the "CAPILLO," after interment near Manila and Shanghai, China, were repatriated to the Port of New York, N.Y., on the second voyage of the International Exchange Motorvessel "GRIPSHOLM," arriving in New York December 2, 1943 (48, 81). The appellants were immediately paid the following:

1. Basic wages and "emergency increase" from October 11, 1941, to December 2, 1943:¹

Steeves and Calgan, oilers,	
at \$110.00 per mo. each	\$2830.67
Porter, fireman,	
at \$100 per mo.....	2573.33
Taylor, messman,	
at \$87.50 per mo.....	2251.67

¹These several terms were thus defined by Mr. Williams, a witness for appellee:

"Q The term will later be used 'basic wages.' Will you state what that term means?

2. War bonus November 2, 1941, date vessel crossed 180th Meridian, west-bound, to December 29, 1941) at \$80 per month, each \$ 154.66
3. Port bonus, each 125.00
4. Loss personal effects, each 150.00
- with usual appropriate governmental deductions.

Each appellant was likewise paid his own estimate as to overtime wages earned during the voyage, ranging from \$68 to \$116.45 (135, 136, 269).

RECOVERY SOUGHT BY AMENDED LIBEL

Appellants *each* seek in this action:

- (a) War bonus from the date of the destruction of the vessel until his arrival on the Pacific Coast of the United States (December 29, 1941, to December 7, 1943) at \$80 per month \$1858.67
- (b) Transportation from New York to Pacific Coast 125.00
-
- Total \$1983.67
- (21, 22)

A The basic wages was the wages agreed upon in the original agreement which was negotiated in the fall of 1939.

Q Will you state what is meant by the term 'emergency increase'?

A Emergency increase was an increase to the base wage.

* * * * *

Q Now, will you state what was meant by the term 'bonus'?

A Bonus was an agreed sum of money to be paid for the additional dangers of going into dangerous waters and war zones." (112, 113, see also 185, 186)

RECOVERY ALLOWED BY TRIAL COURT

Appellants *each* were allowed by the District Court:

(1) Increased war bonus (December 7, 1941, to December 29, 1941) at the rate of \$100 per month under Decision No. 2 of Maritime War Emergency Board, each	\$ 14.69
(2) War bonus during repatriation <i>voyage</i> of M/S "GRIPSHOLM" at the rate of \$100 per month, under practice established for seamen repatriated on that vessel by Maritime War Emergency Board, ² each	273.33
Total	<hr/> \$ 288.02
(48, 49)	

THE SHIPPING ARTICLES OF THE "CAPILLO"

The Shipping Articles of the vessel, except for a Rider, are in usual form providing for a voyage from Portland, Oregon, to Shanghai and Hong Kong, China; thence to the Philippine Islands and back to the Pacific Coast of the United States for a term not to exceed six months. The Shipping Articles contain no reference of any kind to war bonus or other war compensation except in a Rider (Original Exhibit A-2).

²War bonus during repatriation *voyage* was originally declined because *war risk* on the Motorvessel "GRIPSHOLM," operating under International protection, did not appear to be sufficient to warrant payment of war bonus. However, the practice of paying repatriation war bonus to seamen repatriated on the M/V "GRIPSHOLM" was established by the Maritime War Emergency Board (48).

THE RIDER TO THE SHIPPING ARTICLES

The dispute in this case centers upon the interpretation of a Rider to the Shipping Articles of the "CAPILLO," reading as follows:

"The American Mail Line *agrees to pay an emergency war bonus* to the crew of the 'S. S. CAPILLO,' Voyage 6, *in accordance with provisions* contained in the *Applicable Supplementary Agreements* in effect between the Pacific American Shipowners' Association and the various marine unions.

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and *bonus* to the date members of the crew arrive in an United States port, on the Pacific Coast: Furthermore, the Company agrees, in such event, to arrange for repatriation of such men to an United States port, on the Pacific Coast. Also, that the Company be liable for any injuries suffered by any crew member due to war causes.

"The Company agrees to reimburse each man so affected by the amount of \$150.00 in the event of loss of personal effects by any member of the crew due to necessity of abandoning the ship resulting from torpedoing, mining, bombings, shelling, scuttling or any other war causes, which results in the ship wreck of the vessel.

"The Company also agrees to carry war risk insurance in the amount of \$2,000.00 for each member of the crew, against loss of life as a result of war perils.

"It is further agreed that in the event of any *increase in pay, overtime or war bonus*, which

may be granted, as the result of negotiations between the Union and the Pacific American Ship-owners' Association, the Company will be *governed by the terms and effective date* of any agreement so reached.

/S/ GALE T. BLUNDELL,

Deputy U. S. Shipping Commissioner.

/S/ K. O. DRYER,

Master" (31, 36)

We might observe at this point that *without* such a Rider or other corresponding special agreement the further obligation of the operator to the crew of a vessel, whether for wages, bonus, lost effects or repatriation, is *terminated* by her loss or interment.

"An embargo neither destroys nor suspends the right to wages, if the voyage be afterwards completed, or a new one be substituted for it. But if the embargo is never remitted, that is, *if it be in fact a seizure or arrest, and if the voyage is broken up by it without the fault of the owner or his servants, then it puts a stop to the claim for wages, like any other extraordinary termination of the voyage.* * * *"

Parsons on Shipping and Admiralty, Vol. 2,
p. 63.

Saratoga, Fed. Cas. 12,355;

Horluck v. Beal (1916) A.C. 486;

The Edna, 291 Fed. 379;

The Edna, 292 Fed. 640;

Alaska S.S. Co. v. U.S., 290 U.S. 256;

American Mail Line v. U.S., 59 F. Supp.
921;

46 U.S.C. 593.

We give below the salient testimony introduced by

appellee. Appellants introduced no testimony and relied on admissions of appellee.

THE ORIGIN OF THE RIDER

The exact form of Rider used on the "CAPILLO" was prepared by the unions in early August, 1941, and was presented at Portland, Oregon, to American Mail Line Ltd. for use on its vessels (46, 106, 109). It was *first* used on Shipping Articles of a vessel of American Mail Line Ltd., dated August 13, 1941 (107). The Shipping Articles of the "CAPILLO" were the fourth on which the Rider had been used (106).

"AGREEMENTS" AND "SUPPLEMENTARY AGREEMENTS" MENTIONED IN THE RIDER

For some years prior to 1941 collective bargaining agreements covering wages, other compensation and working conditions on principal American vessels operating from the ports of the Pacific Coast, including the vessels of American Mail Line Ltd., had been negotiated for the vessel operators by Pacific American Shipowners' Association and for the various departments of the crew by the following six maritime unions (37, 38, 85, 86, 99, 100, 153, 188, 189, 190):

Masters, Mates and Pilots of America, West Coast Local No. 90

Marine Engineers Beneficial Association

American Communications Association (Marine Division)

Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association

Marine Cooks and Stewards Association of the Pacific Coast

Sailors' Union of the Pacific.

Appellants Steeves, Calgan and Porter belonged to the "Marine Firemen." Appellant Taylor belonged to the "Marine Cooks" (Appellant's brief 25, 29).

In 1940 the Association undertook to establish general standards of *war compensation* through general agreements with each union on a *uniform* basis. Prior to that time the subject of war compensation had been a matter of individual negotiations between a shipowner and a particular union or unions (39, 87, 88, 89, 188, 189).

The American Merchant Marine Institute, Inc., on the Atlantic Coast performed a similar function for principal operators of vessels on the Atlantic Coast (41, 42, 86, 161, 162).

BASIC AGREEMENTS

On August 13, 1941, when the Rider was first used, "Agreements" were in effect between the Pacific American Shipowners Association and the six unions covering so-called "basic" wages and general working conditions dated as follows:

Master, Mates and Pilots	December 30, 1939
Marine Engineers	May 1, 1940
American Communications	July 13, 1940
Marine Firemen	October 7, 1939
Marine Cooks	July 5, 1940
Sailors' Union	October 10, 1939
	(130)

SUPPLEMENTARY AGREEMENTS

On August 13, 1941, when the Rider was first used on a vessel of American Mail Line Ltd., there had been three so-called Supplementary Agreements adopted between the parties providing for trans-Pacific voyages as follows:

First Supplementary Agreements of 1940

Masters, Mates, May 2, 1940, providing in part:

1. "Emergency Increase" of 10% of "basic" wages.
2. *War bonus* of 25% of "basic" wages from *arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound.*

Marine Engineers, May 1, 1940, same provisions.

Marine Cooks, July 5, 1940, providing in part:

1. Emergency increase of 10% of "basic" wages for those earning over \$100 a month.

Flat \$10 a month for those earning under \$100 a month.

2. *War bonus* of 25% of "basic" wages from *arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound.*

Marine Firemen, April 30, 1940, same provisions.

Sailors' Union, April 30, 1940, same provisions

(39, 131).

Second Supplementary Agreements of February 10, 1941

Masters, Mates, February 10, 1941, providing in part:

1. "Emergency increase" increased to 15% of "basic" wages.
2. *War bonus* of 25% of "basic" wages *and* emergency increase *from the crossing of 160th Meri-*

dian westbound until recrossing 160th Meridian eastbound.

Marine Engineers, February 10, 1941, same provisions.

Marine Cooks, February 10, 1941, providing in part:

1. Emergency increase of 15% of "basic" wages to those earning over \$120 per month.
Flat \$17.50 to those earning under \$120 per month.
2. War bonus of 25% of "basic" wages and emergency increase to those earning over \$120 per month, and
Flat \$30 per month to those earning under \$120 per month.

From crossing of 160th Meridian westbound until recrossing 160th Meridian eastbound.

Marine Firemen, February 10, 1941, same provisions.

Sailors' Union, February 10, 1941, same provisions (39, 132).

Third Supplementary Agreements of May 19, 1941

Marine Engineers, May 19, 1941, providing:

1. War bonus of 50% of "basic" wages *from the crossing of the 160th Meridian westbound to recrossing 160th Meridian eastbound.*
2. War risk insurance \$2,000.

American Communications Association, May 19, 1941, same provisions.

Marine Cooks, May 19, 1941, providing:

1. War bonus of 50% of "basic" wages to those earning above \$120 per month.
Flat \$60 per month to those earning under \$120

per month, *from the crossing of the 160th Meridian westbound to recrossing 160th Meridian eastbound.*

2. War risk insurance \$2,000.

Marine Firemen, May 19, 1941, same provisions.

Sailors' Union, May 19, 1941, same provisions (40, 132, 133).

A corresponding Third Supplementary Agreement had *not* been made with the Masters, Mates and Pilots (132).

STATE OF NEGOTIATIONS ON NEW SUPPLEMENTARY AGREEMENTS UNKNOWN TO PARTIES WHEN "CAPILLO" SAILED

On October 11, 1941, when the Shipping Articles of the "CAPILLO" were signed this situation was unchanged in so far as the parties here are concerned. They *knew* of *no* Supplementary Agreement *later* than those of *May 19, 1941* (46, 112, 145, 149). This is the undisputed testimony and is corroborated by the fact that the Rider on the Shipping Articles of the "CAPILLO" was prepared in early August, 1941, and refers to the war risk insurance of \$2,000.00 as provided in the Supplementary Agreements of May 19, 1941 (32, 37).

It will be *particularly* observed that there were *no* supplementary agreements known to the parties in early August, 1941, *or* on October 11, 1941, covering the following:

1. Compensation to be paid members of the crew after a vessel was lost or interned and so unable to continue her voyage due to war causes.

2. Repatriation of the crew in such event.
3. Loss of personal effects in such event (146, 147, 148, 149).

As indicated, without *specific* agreement, seamen would have no rights on these subjects. The emphasis had been on *amount* of bonus. Loss or interment of a vessel seemed remote.

However, in that period, between August and October, 1941, much had occurred in negotiations between the representatives of the operators and the unions in regard to such war compensation. The first and last paragraph of the Rider made such later developments in negotiation a part of the Shipping Articles (98, 154).

DEVELOPMENTS IN COLLECTIVE BARGAINING ON WAR COMPENSATION FOLLOWING EXECUTION OF SUPPLEMENTARY AGREEMENTS OF MAY 19, 1941

Subsequent to the execution of the Supplementary Agreements of May 19, 1941, covering war compensation, unrest and dissatisfaction continued in the matter of *war compensation*, not only between operators and the unions, but particularly between unions, each attempting to work out a more advantageous arrangement for its own membership. Particularly keen rivalry arose between Pacific Coast and Atlantic Coast unions on this subject (40, 189). Many and serious work stoppages resulted. To remedy this condition the United States Maritime Commission and the Department of Labor called conferences of Atlantic Coast and Pacific Coast operators and unions in July and

August, 1941 (40, 89, 165, 190). The following call for this conference was issued, signed by the Chairman of the United States Maritime Commission:

"July 22, 1941

"Mr. Frank J. Taylor, President
American Merchant Marine Institute, Inc.
11 Broadway
New York, New York

"Dear Mr. Taylor:

"A series of conferences are being called on August 12, August 15, and August 19, 1941, between representatives of sea-going organized labor and offshore steamship operators for the purpose of affording these representatives an opportunity of reaching a *decision* covering the payment of *war bonuses* on a *national uniform basis*.

"These conferences will be held under the auspices of the Department of Labor and the Maritime Commission, and will take place in Room 7856 of the Department of Commerce Building, at 10:00 A.M., on the dates mentioned above. The first conference, on August 12, will be devoted to the question of war bonuses as they affect licensed and registered officers; on August 15, as they affect radio operators; and on August 19, as they affect unlicensed personnel.

"This letter constitutes a formal invitation for your association to be represented and participate in these deliberations.

"As the executive officer of your association, the designation of your representatives will be left to your discretion, but it is hoped that in such designation you will have in mind the benefits to be derived from a small but adequate representation.

"Will you advise me of your acceptance of this invitation, as well as of the names of those who, with you, will represent your organization.

"A communication identical to this is being sent to Mr. A. O. Woll, Secretary of the Pacific American Tank Ship Association, and to Mr. J. B. Bryan, *President of the Pacific American Ship-owners Association*. If you think it is desirable that invitations be sent to others than those mentioned herein, will you kindly advise me to that effect.

Sincerely yours,

(Signed) E. S. LAND

E. S. Land, Chairman"

(40-41, 219-220)

Similar letters were sent to all interested parties.

The conferences opened in Washington, D. C., on August 12, 1941, with the following introductory remarks by Commissioner Macauley of the United States Maritime Commission:

"As you know from the letters inviting you to be present, this conference between representatives of the licensed officers' organizations and representatives of the off-shore steamship operators is being held under the auspices of the Department of Labor and the U. S. Maritime Commission, in order to permit these representatives an opportunity to present to the Department of Labor and the Maritime Commission their views as to the determination of a proper *national uniform basis* for payment of *war* bonuses to the licensed officers of American Merchant ships.

"It is desired that this conference be *confined strictly* to the purpose for which it has been called, i.e., to achieve a *nationwide agreement on war risk compensation*. It is considered that *other subjects*, such as wages, hours and working condi-

tions, are extraneous and *not pertinent* to the discussion.

"It is also desired that any agreement reached should be final and binding on all parties and independent of any existing or future agreements as to basic wage scales and working conditions.

"It is not contemplated that a single rate for all of the various services, regardless of the destination of the vessels, should be put into effect, but rather that *in each danger area* the rates should be uniform regardless of the port of original departure.

"The agreement arrived at should *remain* in force *except* in one of the following events:

- (a) *Declaration of war* by or against the United States.
- (b) Change of danger or combat zones proclaimed by the President of the United States.
- (c) Abolition of all *danger zones* as may be anticipated on the cessation of hostilities between the warring countries.

"In either of the first two contingencies, *similar conferences* shall be called by the Maritime Commission and the Department of Labor, to *re-examine* the question of war bonuses.

"If a basic formula for future action is worked out, provision should be made to take care of the compensation to be paid in a new area on the same relative basis as is prescribed for existing areas under the general formula.

"The Commission does not desire to prescribe the agreement to be arrived at, but does insist that the scope of the discussion be confined to the subject of war bonuses. The Commission urges that this matter be settled as speedily as possible,

in a spirit of fairness and cooperation, so that the result may not only be a mutually satisfactory and agreeable working arrangement, but an urgent and important contribution to the National Defense." (42, 221-223)

THE AUGUST CONFERENCE AND NEGOTIATIONS

A contract between *operators* on both Coasts and *licensed* personnel in the Deck and Engine Departments covering war compensation was first considered at the Conference (43, 166, 190). Joint demands had been presented by the licensed officers, i.e., Masters, Mates and Pilots and the Marine Engineers. As applicable to this case, these demands were (166, 167):

1. War bonus of 100% of wages for the "entire voyage" on vessels going to the "Far East." Other rates were suggested for other "voyages," and a bonus rate for certain ports.
2. Loss of personal effects, \$500.
3. Repatriation to port of "*signing on.*"
4. If the vessel be lost or interned, wages, emergency wages *and* war bonus to be paid licensed officers "*until and including the date of their arrival in a port of the United States.*"
5. War risk insurance, \$10,000 (209-212).

On August 12, 1941, American Merchant Marine Institute, Inc., and Pacific American Shipowners Association made a *counter-proposal* suggesting six so-called "Danger Zones," with accompanying bonus "payable for voyages to *above defined zones*" including:

"ZONE IV Transpacific *voyages* to Japan, Philippine Islands, China, Indo-China, East Indies and Malayan Peninsula."

The Associations likewise counter-proposed the following:

1. In Zone IV 50% of basic wages and emergency increase "from crossing of the 160th Meridian of East Longitude westbound, until crossing the same Meridian eastbound."
2. Loss of personal effects, \$300.
3. Repatriation to a "*Continental United States Port.*"
4. If the vessel be lost or interned, *wages and emergency increase* to the date licensed officers *arrive in a continental United States port*, and war bonus "*while the men are in the Danger Zones described above.*"
5. War risk insurance, \$5,000 (192, 242-244).

After further negotiations a joint contract between the two Associations and the two unions representing licensed deck and engine room personnel was effected dated August 16, 1941 (43, 167, 190, 191, 213-223).

THE CONTRACT OF AUGUST 16, 1941

This contract is a major factor in this discussion and the date is important. It will be noted that it is dated three days after the Rider was first *used* and even longer after it was first *presented* by the unions.

This contract covered for the first time in a general agreement the *same subject* matter as paragraphs second, third and fourth of the Rider with some wide variation.

This contract of August 16, 1941, *incorporated* by specific reference the Invitation Letter of Admiral Land and the opening remarks of Commissioner Macauley, quoted above, by *attaching copies thereof* to

the *contract* itself. This is an unusual illustration of the importance of the two documents which will be later further emphasized (167, 168, 213, 219, 221).

This contract of August 16, 1941, adopted six "War risk areas" in substantially the form proposed by the operators. It provides in part:

1. AREA IV (Trans-Pacific voyages) War bonus of "60% of basic wages from the crossing of the 180th Meridian westbound, until recrossing the same Meridian eastbound."
2. Lost effects, \$500.
3. Repatriation to a *continental* United States port.
4. If the vessel be lost or interned, *wages* and *emergency* increase to the date licensed officers arrive in a "Continental United States Port." *No war bonus* was payable in such event (224).
5. War risk insurance, \$5,000 (213-223).

Subsequent negotiations between the two Associations and other unions failed to result in an agreement covering any staff officers or unlicensed personnel on either Coast (43, 89, 169, 192). Frequent work stoppages continued to occur on vessels on both Atlantic and Pacific Coasts (43, 194).

On September 15, 1941, "Marine Firemen" made the following demands upon Pacific American Ship-owners Association:

1. In "Transpacific" trade *war bonus* of 75% of "basic" wages to all employees receiving basic wages in excess of \$120 per month; flat \$90 per month to all employees entitled to receive \$120 or less as basic wages per month. Bonus to be payable from "crossing of the 160th West Meridian westbound, until recrossing same Meri-

dian eastbound." Double bonus for vessels carrying dangerous cargo.

2. Lost effects, \$160.

3. Repatriation to *continental* United States ports.

4. In event vessel be lost or interned, wages *and* bonus to continue "*to the date members arrive in a Continental United States port.*"

5. War risk insurance, \$5,000 (193, 244-249).

On September 16, 1941, "Sailors' Union" likewise made written demands upon Pacific American Ship-owners Association calling for . . .

1. "War Bonus" of \$3 per day to each unlicensed member of the deck department in "transpacific" trade from the "day vessel crosses the 160th West Meridian, westbound, until the crossing of the same Meridian eastbound."

2. Loss of personal effects, \$250.

3. Repatriation to a *Pacific* Coast port.

4. If the vessel be lost or interned, wages *and* bonus for each member of the deck department "*until arrival at home port.*"

5. War risk insurance, \$10,000 (193, 250-255).

Other miscellaneous demands were likewise included by both unions. Other unions awaited developments and did not present demands at this time (193).

The situation became so acute due to frequent work stoppages on vessels on both Coasts, that on September 22, 1941, Admiral Land, Chairman of the United States Maritime Commission, telegraphed the two Associations of operators and the unions as follows:

"Maritime Commission views with concern

and anxiety the danger to shipping so vitally needed for national defense and all out aid to the democracies unless some method and procedure are immediately found and resorted to which will remove future sources of contention between all elements of the industry and which will stabilize and to a greater extent than now prevails *standardize* bonuses on our various trade routes. Believing that the solution of these problems rests primarily in the hands of representatives of operators and representatives of personnel and that these objectives can be secured through a joint meeting, the Maritime Commission will if requested by these representatives call such a meeting. We therefore offer the facilities of the Maritime Commission for purposes of holding conferences between the Seafarers' International Union, National Maritime Union, Sailors' Union of Pacific, Marine Cooks & Stewards of Pacific and Marine Firemen, Oilers, Water Tenders and Wipers Association of Pacific representing unlicensed personnel of vessels operated by companies who have collective bargaining agreements with those unions and the American Merchant Marine Institute, also the Pacific American Shipowners Association representing the owners, also other owners not members of those associations so that agreement can be reached between the owners and the unlicensed personnel with respect to *war bonuses* and *war risk areas*. Will be glad to make our facilities available for meeting in Washington Thursday this week. The Maritime Commission urges immediate return to work and sailing of vessels. Will appreciate your telegraphic reply. E. S. Land, U. S. Maritime Commission." (43, 44, 170, 171)

The "joint meeting" suggested by this wire, was not held, but the subject of war compensation of unlicensed personnel finally came before the National Defense Mediation Board in Case No. 80, on September 29, and October 1, 2, 3 and 4, 1941, in a proceeding in which American Merchant Marine Institute, Inc., and Pacific American Shipowners Association and the Sailors' Union of the Pacific were parties (45, 171, 172, 194). On October 6, 1941, the Board rendered its recommendations in which it created five "war risk areas" substantially similar to those of the agreement of August 16, 1941, between the Associations and the unions representing licensed personnel (171, 172, 195, 226). The recommendations of the Board provided, in part, the following:

1. War risk bonus of \$80 per month for "Trans-pacific voyages" after "*crossing the 180th Meridian westbound until recrossing the same Meridian eastbound.*"
2. \$100 per day, plus \$5 per day for each day beyond five days that the vessel is in a port subject to regular bombing (226-231).

These recommendations as to "voyages" followed closely the contract of August 16, 1941.

No special provision was made for loss of *personal effects, repatriation, compensation during internment, or war risk life insurance*. Provision, however, was made for modification in case of spread of hostilities. These recommendations were eventually incorporated by the parties in their contracts (120, 173).

FURTHER DEVELOPMENTS IN LABOR NEGOTIATIONS ON WAR COMPENSATION ON PACIFIC COAST UNTIL "PEARL HARBOR"

Shortly following the publication of the Decision of the National Defense Mediation Board, in Case No. 80, and its acceptance, Fourth Supplementary Agreements covering the subject of war compensation were effected by Pacific American Shipowners Association with the six maritime unions on a substantially *uniform* basis. These six Supplementary Agreements were dated as follows (45, 46, 133, 195):

Masters, Mates	October 10, 1941 (259-265)
Marine Engineers	October 15, 1941 (265)
American Communications	October 16, 1941 (266)
Marine Firemen	October 9, 1941 (114-117)
Marine Cooks	October 10, 1941 (119-126)
Sailors' Union of the Pacific	October 9, 1941 (266-268)

These *October Supplementary Agreements* provided as follows:

1. "Five war zones," including "Transpacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula (after crossing the 180th Meridian westbound until recrossing the same Meridian eastbound)."
2. War Bonus of a *flat* \$80 a month to unlicensed personnel earning less than \$120 a month. (War bonus of 66 2/3% of basic wages was granted to unlicensed personnel receiving over \$120 a month *and* licensed officers by the October Supplementary Agreements. This increase over the rate in the contract of August 16, 1941, with licensed officers was necessary on both Coasts to equalize the licensed officers with the October

- increase given the unlicensed personnel (177, 196).
3. Lost effects, licensed officers and radio operators, \$500; unlicensed personnel, \$150.
 4. Repatriation to "Continental United States port."
 5. If vessel be lost or interned *basic wages* and *emergency wages* until arrival at "Continental United States ports," and war *bonuses* at the rates specified * * * shall be paid while "*employees are in the war zone areas described herein.*"
 6. War risk insurance, all crew members, \$5,000 (114-117, 119-126).

The provisions of the October Supplementary Agreements with unlicensed personnel *including the four appellants all* contain the following two clauses:

"4. War Risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessel on voyages provided for in this agreement.

"In the event a vessel is *interned, destroyed* or abandoned as a result of war operations and is unable to continue her voyage, the *basic wages* and *emergency wages* specified in the collective bargaining agreement between the parties shall be *paid to the date the members of the crew arrive in a Continental United States port* and the employees shall be repatriated to a Continental United States port. War *bonuses* at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid *while employees are in the war zones defined herein.*

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, min-

ing or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00." (123-124)

6. "The *provisions* of this agreement shall be *effective on all voyages* shipping articles for which were entered on or *after August 16, 1941, or upon any voyage* to which the *provisions* herein are made *applicable by special agreement or rider attached to shipping articles.*" (124)

The October Supplementary Agreements covering licensed personnel and radio operators likewise contained language of similar character (259, 265, 266). The close relationship of the October Supplementary Agreements with the August Conferences and the objectives there sought of *uniformity* will be noted. The October Supplementary Agreements *all* became effective as of August 16, 1941, and in the case of the three unions representing *unlicensed* personnel each *likewise* refer specifically to the Decision of the National Defense Mediation Board in Case No. 80 (115, 120, 267). It is undisputed that the subject matter of the October Supplementary Agreements was unknown to the operator or crew of the "CAPILLO" when the Master signed on his crew October 11, 1941, and even when the vessel sailed (46, 112, 145, 149). On November 5, 1941, the operator purchased increased War Risk Insurance on all members of his crew from the \$2,000 of the May Supplementary Agreements and the Rider to the \$5,000 of the October Supplementary Agreements (157).

New agreements providing an *increase* in basic wages were finally negotiated and signed between

Pacific American Shipowners Association and the six unions as of the following dates:

Masters, Mates and Pilots,	December 12, 1941
Marine Engineers,	November 28, 1941- January 15, 1943
American Communications,	November 18, 1941
Marine Cooks,	October 31, 1941
Marine Firemen,	October 10, 1941
Sailors' Union	November 4, 1941
	(134)

By these agreements the basic wages of each of the appellants was increased \$10.00 a month. Considering the provisions of these agreements providing for increase in wages to have been incorporated by the Rider, appellants were each paid in New York at a wage rate of \$10.00 a month in excess of that shown on the Shipping Articles (135, 269).

FURTHER DEVELOPMENTS IN LABOR NEGOTIATIONS ON WAR COMPENSATION ON ATLANTIC COAST UNTIL "PEARL HARBOR"

Following the decision of the National Defense Mediation Board in Case No. 80 negotiations continued between the American Merchant Marine Institute, Inc., and the National Maritime Union of America, looking to an agreement covering war compensation for *unlicensed* personnel on the East Coast similar to the agreement reached on August 16, 1941, with licensed personnel (174, 175). As of November 6, 1941, such an agreement was made providing eight types of "*voyages*." As to the voyage here involved it provided:

1. "On the trans-Pacific, Far East and Australian

runs, \$80 per month from the 180th Meridian, westbound, until return to the 180th Meridian, eastbound."

2. Lost effects, \$150.
3. Repatriation to a "*Continental* United States port."
4. If the vessel be lost or interned, *basic wages* and *emergency wages* until arrived at a "Continental United States port." As in the case of licensed officers *no war bonus* was payable in such event (183, 186, 224).
5. War risk insurance, \$5,000 (231-236).

As of December 2, 1941, a similar contract was made between the parties covering certain *voyages* to Russia and the United Kingdom (176, 236-240). This contract likewise allowed basic wages and emergency increase after *loss* or internment of the vessel but *no bonus* was payable in such event. Also the agreement of August 16, 1941, between operators and unions on the Atlantic Coast was amended to raise bonus from 60% to 66 2/3% of basic wages to equalize the increased bonus to unlicensed personnel (177, 178). Thus on December 7, 1941, the *uniformity* so strongly urged by Admiral Land and Commissioner Macauley in the meetings held in August, 1941, was substantially attained on both Coasts by signed collective bargaining agreements.

FURTHER NATIONAL DEVELOPMENTS ON WAR COMPENSATION FOLLOWING "PEARL HARBOR"

In accordance with the promise made by Commissioner Macauley in his remarks on August 12, 1941, heretofore quoted (222), a meeting of all operators and unions on both Coasts was called in Washington, D. C., by the United States Maritime Commission and the United States Department of Labor on December 17-19, 1941, within ten days of the attack on Pearl Harbor (47, 92, 199). At this meeting a "Statement of Principles" was adopted and signed on behalf of the operators, including American Line Ltd. and the unions, including all here involved (47, 92, 199-205). The opening paragraph is as follows:

"I. In so far as areas, war bonuses and insurance are concerned, it is regarded as desirable and necessary that a *uniform basis* for each item covering the entire Nation and the entire Industry be reached."

By a *joint voluntary action* of the parties the "Maritime War Emergency Board" was created to settle "questions relating to *war risk compensation* and insurance," it being impossible for the parties to negotiate intelligently on the subject because of war secrecy as to comparative risk in war zones. A three-man board was proposed whose decision on any "*question* relating to *war risk compensation* or *war risk insurance*" was "*final and binding upon all parties*" (203).

On December 19, 1941, the President of the United States, upon the joint request of the parties, appointed a board of three to carry out the purposes of

the "Statement of Principles" (205-6). The Board has "exclusively handled" all *bonus* questions since its appointment (92, 93). At this time the "CAPILLO" was still on her "voyage" awaiting orders of the Government authorities in Manila (36, 81).

DECISIONS OF THE MARITIME WAR EMERGENCY BOARD

The Board on December 22, 1941, by Decision No. 1, made *retroactive* to December 7, 1941, promptly established war risk insurance of \$5,000. Other Decisions quickly followed. See 1942 A.M.C. 308.

By Decision No. 2, dated January 10, 1942, likewise made *retroactive* to December 7, 1941, the Board divided "voyages" into six classifications in the same manner as had the Supplementary Agreements which it superseded (272-274). In fact the Decision said:

"In making this Decision the Board has given due consideration to the existing conditions at sea and in port, based upon the latest and best information available, *and to existing collective bargaining agreements.*" (270)

Decision No. 2 of the Board increased war bonus in Classification No. I(b) "Trans-Pacific voyages" to 100% of wages and emergency increase with a floor of not less than \$100.00 per month in any case (47, 48, 272, 274). It provided a *port bonus* of \$125.00 for calls in the Philippine Islands (275).

Decision No. 5 of the Board was first made January 23, 1942. It covered for the first time "payments to seamen * * * while interned as a result of enemy action and until repatriation to Continental United

States." It was made retroactive "to and including December 7, 1941." It only provided for payment of "basic wages and emergency wages" after loss or destruction of the vessel. It had no provision for continuation of bonus after loss or internment of the vessel. This decision said:

"In making this Decision the Board has given careful consideration * * * to existing collective bargaining agreements." (288)

A Supplement to Decision No. 5, dated February 6, 1942, is of no importance here (293). A third amendment to Decision No. 5, dated February 17, 1942, for the first time specifically covered the subject of continuation of bonus following the loss or internment of the vessel. It said:

"2. The Board has given consideration to the continuance of bonus in the case of the destruction of the vessel, which subject was not covered by Decision No. 5, and, as a result, Decision No. 5 has been amended by inserting a new Article at the end thereof, designated Article 6 and reading as follows" (295):

By Article 6 the rule is stated that when a United States vessel is lost or interned war bonus continues "until the seaman arrives at a port where he is no longer exposed to marine perils * * *" (295-296). If he is repatriated by sea then he shall receive *during the repatriation voyage war bonus* at the same rate that he would have received if his own vessel were making the same *voyage* as the vessel on which he is being repatriated. In other words war bonus was not ended at once upon loss or internment of vessel, but continued to be payable when a seaman is exposed to a marine *and* war risk (See definition of bonus, 113).

The three amendments were combined without further change in Decision No. 5, Revised, issued February 21, 1942 (280-287). Decision No. 5, Revised, with the last amendment referred to above, provides:

"The Board has given *additional* consideration to the current war conditions at sea and to *existing collective bargaining agreements* prior to writing these revisions." (280-281)

Decision 5 Revised provides:

"This Decision is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ships Articles entered into on or before * * * February 21, 1942, with respect to payments provided for in Article 6 hereof or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, *or where the making of such payments were expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements.*" (281-282)

The rule of the Maritime War Emergency Board that no bonus is payable during *interment ashore* has been the uninterrupted rule of the Board since its first pronouncement on the subject.³ Its last pronounce-

³Maritime War Emergency Board Weekly Bulletin No. 12. March 6, 1943. Ruling No. 8.

Weekly Bulletin No. 17, April 10, 1943. Ruling No. 4.

See also Original Respondent's Exhibit A-13, Article January, 1944, Monthly Labor Review, U. S. Dept. of Labor, *not admitted* by trial court. Note, however, a correction of this article in one respect (182, 183).

ment on the subject was in Decision 2-D, dated August 31, 1945:

“Article IV, A(1)

“1. Bonus shall *not* be payable while a crew member is *on land* after separation from his vessel.

“2. Bonus shall *not be payable during* the period that a crew member is *detained* either by capture by the enemy of an United States or *by internment.*”

1945 A.M.C. 1176, 1182.

The trial court adopted the view that Decision 2 and Decision 5 Revised of the Maritime War Emergency Board were incorporated by the first and last paragraphs of the Rider and so became controlling, and gave judgment accordingly (47-49).

ARGUMENT

Admissibility of surrounding circumstances in construction of ambiguous contract.

It is well settled that the situation of the parties and the surrounding circumstances may be taken into consideration in construing an ambiguous contract. This would seem especially true where, as here, the contract itself incorporates by reference the terms of outside agreements then under negotiation.

In *New York Alaska Company v. Walbridge* (C.C. A. 9) 76 F.(2d) 655, the court said:

“It is also well settled that when the meaning of a contract is not clear, the situation of the parties and the surrounding circumstances at the time of the making of the contract are to be taken into consideration.”

Franklin Fire Co. v. Hanney (C.C.A. 9)
149 F.(2d) 150;

Mobile & Montgomery Co. v. Jurey, 111
U.S. 584, at 592.

This is also the law of Oregon and Washington.

Teiser v. Swirsky, 137 Ore. 595, 2 P.(2d)
920.

In *Vance v. Ingram*, 16 Wn.(2d) 399, 133 P.(2d)
938, the court said:

“One further rule of construction should be mentioned. The court may always consider the surrounding circumstances leading up to the execution of an agreement, not to evidence an intent contrary to that expressed in the agreement, but to place the court in the same position as the parties. * * *”

12 Am. Jur. 784;

Restatement of Law of Contracts, §230,
§235(d), §242.

Which supplementary agreements are incorporated by the rider?

For ready reference we quote again the first and last paragraphs of the Rider at this point:

“The American Mail Line agrees to pay an emergency war bonus to the crew of the S. S. CAPILLO, voyage 6, in accordance with *provisions* contained in the *applicable* supplementary agreements in effect between the Pacific American Shipowners’ Association and the various marine unions.

* * * * *

“It is further agreed that in the event of any *increase* in pay, overtime or war bonus, which

may be granted, as the result of negotiations between the Union and the Pacific American Ship-owners' Association, the company will be governed by the *terms* and *effective* date of any agreement so reached." (31, 32, 36, 37)

This language is susceptible of three possible interpretations:

Are supplementary agreements of May 19, 1941, incorporated?

It could possibly be argued that the "applicable" Supplementary Agreements made effective by the first paragraph of the Rider are the agreements of May 19, 1941. In support of this theory the following might be urged:

1. It was clearly the one actually in the mind of the parties when the Rider was *first* used. No other existed on August 13, 1941. That this was likewise so even on October 11, 1941, is indicated by the reference in the Rider to the war risk insurance of \$2,000.00 created by the Agreements of May 19, 1941, and the ignorance of the parties of the *terms* of any other supplementary agreements (46, 112, 145, 149).

2. It explains the inclusion of the second and third paragraphs of the Rider having to do with compensation after loss or internment of the vessel and for lost effects. These were inserted because no provision was made for such matters in the agreements of May 19, 1941, and no agreement on same had been reached on August 13, 1941, when the Rider was *first* used. As heretofore indicated, *without such provisions*, upon loss or internment of the vessel further obligation to the crew *terminated*. Its use was continued because

no agreement was known to exist on such matters on October 11, 1941, when it was placed on the Shipping Articles of the "CAPILLO" (46, 98, 112, 145, 149, 154).

Such an interpretation, however, *completely ignores*:

(a) The obvious attempt of the *first* paragraph of the Rider to incorporate the "provisions" of Supplementary Agreements as they became "applicable," thus keeping the Rider at all times *current* with the rapidly changing conditions.

(b) The *last* paragraph of the Rider which incorporates the "*terms and effective date*" of any later agreements which increased "pay, overtime or war bonus."

It might be emphasized here that there were several increases in "pay, overtime or war bonus" in the October Supplementary Agreements over the Supplementary Agreements of May 19, 1941, thus likewise bringing into play the last paragraph of the Rider.

1. The rate of bonus was increased from \$60.00 a month to \$80.00 a month, for unlicensed personnel, such as appellants, earning under \$120.00 a month (133, 116).

2. For licensed officers and unlicensed personnel earning over \$120.00 a month bonus was raised from 50% of basic wages to 66 2/3% of basic wages (132, 116, 261, 265).

3. The area in which bonus was payable in all cases was increased *from* the crossing of the 160th Meridian westbound to recrossing the same Meridian eastbound

to the period from crossing the 180th Meridian westbound to recrossing the 180th Meridian eastbound (132, 116, 261).

4. Port bonus was provided in the case of unlicensed personnel for ports subject to regular bombing (114, 117, 266).

5. Payment for lost effects of unlicensed personnel was provided at \$150.00 and for licensed personnel at \$500.00 for the first time in the October Supplementary Agreements (114, 117, 259, 265, 266).

6. War risk insurance increased for all persons from \$2,000.00 to \$5,000.00 (114, 117, 259, 265, 266).

It will be also recalled that basic wages for the appellants had been raised \$10.00 a month by contracts negotiated in the late fall of 1941, and appellants were paid off at these new basic rates rather than those shown in the Articles (135, 269).

(c) The following language of the October Supplementary Agreements covering the four appellants:

“6. The *provisions* of this agreement *shall* be effective on *all voyages* shipping articles for which were entered on or *after August 16, 1941*, or upon *any* voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles.” (124)

By this clause of the October Supplementary Agreements it is mandatory that their “provisions” are effective “on all voyages” shipping articles for which were entered into on and after “August 16, 1941,” which, of course, includes the voyage here in question which commenced some two months after August 16, 1941.

It is an interesting sidelight on the use of the Rider that when it was first used on August 13, 1941, the alternate paragraph of the quotation above would have been applicable and it would be incumbent upon the court to decide whether or not the October Supplementary Agreements had been incorporated by "special agreement or rider attached to shipping articles." On the subsequent three occasions when the Rider was used, however, no such determination would have been necessary as it was *mandatory* that the provisions of the October Supplementary Agreements be applied.

So again, this is likewise the uncontradicted testimony of the witnesses in the case.

MR. LINTNER: "My understanding was at the time that a rider was just a temporary understanding which was to be interpreted and determined by the results of negotiations which were under way at the time. It was not unusual for us to put on riders on articles to cover situations that were under discussion, and in every case it was the practical application that the results and the agreements reached in connection with those riders were what the rider meant." (98, 99)

MR. WILLIAMS: "Well, it is my opinion that, in the first place, the rider to the articles was introduced by the Union officials, and not necessarily by the men themselves, so the men recognized that the Unions were acting on behalf of them when the rider was first presented. So, with the reading of the first paragraph and the last paragraph, in which *they agree to be bound by any supplemental agreements negotiated between the Ship Owners and the Unions*, that that in itself proved that the men were giving the Union authority to act on their behalf." (154)

It is therefore clear that (aside from the question of the applicability of the Decisions of the Maritime War Emergency Board) the "provisions" of the October Supplementary Agreements were incorporated in the contract of employment of appellants and supplanted the rider provisions to the contrary. This was accomplished: (a) by the first and last paragraphs of the Rider; (b) by the language of the October Supplementary Agreements themselves, and (c) by the uncontradicted testimony of the witnesses.

The amended libel, the opening statement of appellants at the trial and the appellants' brief specifically rely upon the October Supplementary Agreements (17, 81; Appellants' Brief, pp. 29, 37, 59).

Are supplementary agreements of October, 1941, incorporated by the rider?

Disregarding for the moment the decisions of the Maritime War Emergency Board, it thus appears that all parties are in agreement that the October Supplementary Agreements apply. The particular applicable "provisions" and "terms" of the October Supplementary Agreement between the Marine Cooks and Pacific American Shipowners Association dated August 9, 1941, reads as follows:

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the *basic* wages and *emergency* wages specified in the collective bargaining agreement between the parties shall be paid to the *date* the members of the crew arrive in a *Continental* United States port and the employees shall be repatriated to a *Continental* United States port. War *bonuses* at the rates

specified in subdivision (b) of paragraph 1 hereof shall be *paid while employees are in the war zones defined herein.*" (123-124)

The agreement with the "Marine Firemen" is identical (73, 74, 114-117). By this "provision" of the Supplementary Agreement the obligation of appellee in the Rider to "repatriate to a United States Port on the *Pacific Coast*" has been supplanted by the obligation merely to repatriate "to a *Continental* United States Port." This was admittedly done when the four appellants were landed from the M/V "GRIPSHOLM" at New York on December 2, 1943.

The quoted paragraph from the October Supplementary Agreement likewise substituted for the obligation of appellee in the Rider to pay "*bonus* to the date members of the crew arrive at a United States Port, on the *Pacific Coast*," the obligation merely to pay war bonus in case of loss or internment of the vessel "*while employees are in the war zones defined herein.*"

History of clause in October supplementary agreements providing that in case of loss or internment of vessel war bonus was to be paid "*while employees are in the war zones defined herein.*"

The following will be observed from the foregoing detailed discussion of the negotiations between the operators and the unions:

1. There was no Supplementary Agreement on the subject of *any* compensation after loss or internment of the vessel before August 16, 1941. Without some

special agreement *all* compensation ended in such case.

2. In negotiations with licensed officers leading up to the contract of that date they sought in case of loss or internment of vessel "wages and emergency wages *and* war bonus until and including the day of their arrival in a port of the United States," thus linking *wages* and *bonus*.

3. Operators made a counter-proposal agreeing to this demand for wages and emergency wages but offering to pay bonus in such event *only* "*while the men are in the danger zones defined herein,*" thus clearly disassociating *wages* and *bonus* and limiting the latter to the *period* when employees were in a "defined" zone.

4. In the actual agreement of August 16, 1941, between the operators and *licensed* officers *bonus ceased* upon the loss or internment of the vessel although wages and emergency increase continued until the officers were repatriated to a continental United States port. This situation continued on the Atlantic Coast in the case of licensed personnel until "Pearl Harbor."

5. On the *Atlantic Coast* supplementary agreements between American Merchant Marine, Inc., and *unlicensed* personnel *likewise ended* war *bonus* upon the loss or internment of the vessel, although wages and emergency increase continued until repatriated to a continental United States port.

6. On the Pacific Coast, however, after the August agreement with licensed officers, the unlicensed personnel in their negotiations with Pacific American Shipowners Association continued to demand wages

and bonus in case of loss or internment of the vessel until seamen were returned to a continental United States port or to the home port, thus again linking wages *and* bonus.

7. In *all* six October Supplementary Agreements on the Pacific Coast the parties finally adopted the *counter-proposal* made by the two Associations to licensed officers on the subject of compensation after loss or destruction of the vessel in the negotiations leading up to the contract of August 16, 1941. These October Supplementary Agreements provided that in the event a vessel was lost or interned "basic" and "emergency wages" would be paid until arrival of the crew member in a continental United States port, *but bonus* was only payable "while employees are in the *war zones* defined herein."

What is a "war zone" as "defined" in the October supplementary agreements?

The October Supplementary Agreement covering "Marine Cooks" provides in part as follows:

"1. The following war bonus rules shall govern the parties hereto—

"(a) There shall be five *war zones*; namely:

"I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

"II. Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage).

"III. Trans-Pacific Voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound.)

"IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

"V. Canada (Atlantic Coast) (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port.)" (120,121) (See entire Supplementary Agreement in appendix to this brief.)

The other October Supplementary Agreements are substantially the same (114, 119, 259, 265, 266). They all followed the form of the contract of August 16, 1941, and the decision of the National Defense Mediation Board in Case No. 80 to which they are so closely tied.

From the time of the First Supplementary Agreement made by Pacific American Shipowners Association with the Unions on the subject of war compensation, bonus has been universally linked with "voyages," "vessels" and "waters." The contract of August 16, 1941, the decision of the National Defense Mediation Board in Case No. 80 and the October Supplementary Agreements continued linking this definition of a *war zone* with "voyages"; some mention specifically a "vessel" (121, 131, 261, 262). The uncon-

tradicted testimony in the instant case is to the same effect.

“Q. Now, will you state what was meant by the term ‘bonus’? A. Bonus was an agreed sum of money to be paid for the additional dangers of going into dangerous *waters and war zones*.” (113)

A “voyage” is thus defined in the dictionary:

“Formerly, a passage either by sea or land; a journey, in general; *now, only*, a passing or journey by sea or water from one place, port, or country, to another; esp., a passage or journey by *water* to a distant place or country.”

Webster’s New International Dictionary.

“Voyage. 1. A journey by *water*, especially by sea; commonly used of a somewhat extended journey by water; formerly, any journey, as, a voyage across the sea. 2. Specif., the outward and homeward passages of a vessel taken together; the whole course of a vessel before reaching her home port.”

Funk & Wagnalls New Standard Dictionary.

The slight ambiguity in the meaning of the language in the October Supplementary Agreements on *bonus* may be accounted for by the fact that under the October Supplementary Agreements the “*war zone*” in *question* is “defined” as follows:

“III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound until recrossing the same Meridian eastbound)” (121)

Standing alone, this might be thought to create a “war risk zone” of all *land* and *sea* west of the 180th

Meridian and thus entitle the crew member of a vessel lost or interned west of the 180th Meridian to *bonus* whether he was on *land* or *sea* until he recrossed the 180th Meridian eastbound. This is the view of appellants (Appellants' Brief, p. 42). Taken literally, the theory mentioned above might allow appellants to continue to collect bonus as they have never *recrossed* the 180th Meridian eastbound, the M/V "GRIPSHOLM" having continued around the world and having discharged appellants in New York. This is *not* the meaning of the Supplementary Agreement. Bonus is payable only while employees are in the "war zones *defined* herein." Wages and emergency increase, on the other hand, are linked to a period of *time*, and continue after loss or internment of the vessel to the "date the members of the crew arrive *tive* of the *location* of the individual."

In the First Supplementary Agreements of 1940, in the Second Supplementary Agreements of February 10, 1941, and in the Third Supplementary Agreements of May 19, 1941, bonus was payable in terms of "*voyages*" first from arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound, then from crossing of 160th Meridian westbound until recrossing the 160th Meridian eastbound. At that time, it will be recalled, there was *no* provision whatsoever in supplemental agreements for payment of any compensation *after* loss or internment of the vessel and the consequent end of the "voyage." As explained above, prior to the agreement of August 16, 1941, there being no specific contractual obligation to pay any compensation after

loss or internment of the vessel it would *automatically cease* upon such event. *The Supplementary Agreements of 1940, February 10, 1941, and May 19, 1941, that bonus was payable from arrival of vessel at first Japanese port westbound until departure from last Japanese port eastbound, and from crossing of 160th Meridian westbound until recrossing the 160th Meridian eastbound, at that time could only refer to its continuance during a combined marine and war risk, as it necessarily ended when the vessel was lost or interned.*

In so far as wages and emergency increase were concerned the October Supplementary Agreements specifically provided that they should be paid "to the date the members of the crew arrive in a Continental United States port." But as to bonus it was to be paid "while employees are in the war zones *defined* herein," which definition is in virtually the same language as it had been for a year and a half before any provision was made for its continuance after loss or internment of the vessel, and when it could *only mean* that it was payable only while a combined war *and* marine risk existed. In other words, loss or internment of the vessel did not terminate bonus at once, if the seamen were still on a "voyage" exposed to marine risk.

A "war zone" as defined in the Supplementary Agreements has always contemplated from the beginning a combined marine *and* war risk.

The same language has continued to have the same meaning.

Words used in one sense in one part of a contract

are as a general rule deemed to have been used in the same sense in another part of the instrument where there is nothing in the context to indicate otherwise.

In *Pringle v. Wilson*, 156 Calif. 313, 104 P.(2d) 316, 24 L.R.A., N.S., 1090, the court said:

“It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another.”

In *Jensen v. Franklin* (10 C.C.A. 1934) 74 F.(2d) 501, the court said:

“Words used in a certain sense in one part of a contract will be deemed to have been used in the same sense in another part, unless the context indicates otherwise.”

In *Midland Valley R. Co. v. Railway Express Agency* (10 C.C.A. 1939) 105 F.(2d) 201, the court said:

“It is an inveterate rule in the construction of a written instrument that ordinarily the same word occurring more than once is to be given the same meaning unless the context indicates that it was used in a different sense.”

12 Am. Jur. 761.

The situation is clarified if we take another “war zone” to use as an illustration. “War Zone * * * II” is described as follows:

“Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)” (121).

This obviously means that a crew member is entitled to bonus on the entire *voyage* from the United States to Russia and return irrespective of crossing any particular meridian. It could certainly not be successful-

ly urged that in the event of loss or internment of a vessel making such a voyage that a crew member who had been interned in Europe, say in Germany, would be entitled to bonus during the period of his *internment ashore*. A crew member might on such a voyage very well have been captured by a German vessel and interned in Germany and later repatriated to the United States. In such case by the October Supplementary Agreements wages and emergency wages would certainly be payable until his repatriation to a "Continental United States port." However, he could certainly not successfully claim that during his internment he was in a "war zone defined herein" when the definition was "Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)." He would probably be entitled under such circumstances to bonus until he reached shore after loss of his vessel and the obligation might be resumed through his repatriation voyage, if he were repatriated by sea. But internment ashore, in, possibly, Southern Germany, would certainly *not constitute* being "*in the war zones defined herein*," to-wit: "Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)," so as to entitle him to bonus for the period.

The counter-proposal of the two Associations at the Washington Conference on August 12, 1941, thus adopted on the Pacific Coast in the October Supplementary Agreements, was a compromise by which the bonus would *not stop* at once upon the loss or internment of the vessel but would continue so long as there was a marine *and* war risk encountered before the crew reached land or during a repatriation voy-

age. In August, 1941, it was a counter-proposal to the unions' demand that war bonus should continue *like wages* after the loss or internment of a vessel *until the crew be repatriated to the United States*. The counter-proposal of the Associations first incorporated in the Pacific Coast October Supplementary Agreements finally became the *national* rule under the Maritime War Emergency Board.

When the Maritime War Emergency Board was created after "Pearl Harbor" it gave "*additional consideration * * * to existing collective bargaining agreements*" (280) before adopting a rule on bonus after loss or internment of the vessel, and adopted, *not* the strict rule of the Atlantic Coast that following loss or internment of the vessel *bonus ceased entirely*, but it adopted the more *liberal* policy of the Pacific Coast agreement once *offered* by the two Associations that war bonus, being always a compensation for marine *and* war risk, should continue even after loss or capture of the vessel, while crews were exposed to both risks, which meant until they reached shore after a loss or while they were being repatriated by sea.

If the October Supplementary Agreements are controlling the decision of the lower court must be slightly modified in the following respects:

1. Increased war bonus from December 7, 1941, to December 29, 1941, to each appellant in the sum of \$14.69 must be *disallowed*.
2. War bonus during the repatriation voyage of the M/V "GRIPSHOLM" must be reduced 20% from \$100.00 to \$80.00 per month.

Otherwise, the decision of the lower court must be

affirmed. The difference in the final result is not substantial.

Are decisions of Maritime War Emergency Board incorporated?

The adoption of the October Supplementary Agreement possibly does not, however, give *full effect* to the last paragraph of the Rider as there were subsequent developments following the commencement of the war which *increased* bonus which such a construction would ignore.

The Decisions of the Maritime War Emergency Board were adopted by the trial court as having been incorporated by the terms of the Rider. Such a construction follows the trend of negotiations toward *National Uniformity* in the summer and fall of 1941. In the August meeting of the Industry, Chairman Macauley of the U. S. Maritime Commission, emphasized that contracts should only be made to last until a war started. He promised that in such event another meeting would be called to review the subject in the light of commencement of the war (222). His remarks were made a part of the contract of August 16, 1941, and are an integral part of the background leading to the solution of this case.

In accordance with the promise of Commissioner Macauley a meeting was called jointly by the U. S. Maritime Commission and the Department of Labor in Washington, D. C., ten days after the war started; all interested operators and unions attended, and the voluntary board created by the parties at such time has functioned uninterruptedly in connection with *all*

bonus questions since the war began (92, 93, 200-6). This Board substantially *increased* bonus rates and extended bonus areas by its Decision No. 2 following the pattern of "voyages."⁴ (47, 48, 272, 274) As indicated above, it also adopted what it believed to be the most liberal general policy of the industry on bonus payments after loss or internment of the vessel, as reflected by "*existing collective bargaining*" agreements on the Pacific Coast. The Decisions of this Board thus increasing "bonus" would seem to be agreements the "terms and effective date" of which are incorporated by the last clause of the Rider. They would further seem to be "the result of negotiations" within the broad sense of the words as the last paragraph of the Rider provides (31, 36).

The Maritime War Emergency Board in a Decision made June 21, 1944, upheld its authority under the "Statement of Principles" to *reduce*, as well as *raise*, war bonuses. In the course of the opinion, the court said (1944 A.M.C. 1022):

"It has always been the theory and practice of the Board that the Statement of Principles was *not* a *departure* from collective bargaining practices, but was a plain mandate from the signatories to the Board to set up a procedure to cover war risk compensation and insurance on a *uniform* basis covering the entire nation and the entire industry for the duration of the war. To return now to individual bargaining between individual operators and unions in this field or to

⁴For general discussion of early activities of Maritime War Emergency Board, see 1942 A.M.C. 308, discussing the first five Decisions of the Board.

take the position that the Board can act on individual cases and take action on a *national uniform basis* only by way of recommendation, is to deny the controlling intent of the Statement of Principles and to reproduce the chaos and confusion which brought the signatories together in December of 1941."

So again, the making of payments in the event the vessel was lost or interned might well be said, in view of the last paragraph of the Rider, to have been "expressly left open subject to later agreements either in ship's articles or such collective bargaining agreements" within the meaning of the language of Decision No. 5, Revised, making it retroactive in that event to December 7, 1941 (281-282). The last paragraph of the Rider expressly made the "terms" of subsequent negotiations, which *raised bonus*, governing.

The language of the Statement of Principles (Respondent's Exhibit K) (199) reading as follows should not be misinterpreted:

"It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated." (See appellant's brief, page 53)

This language has to do with the general subject of collective bargaining on wages and working conditions. It is undisputed that the Maritime War Emergency Board since its creation has "exclusively handled" all bonus questions (92, 93). The Decisions of the Maritime War Emergency Board on bonus from

the beginning cut directly across existing agreements by making the Decisions retroactive.

Appellants at first appeared to think the Decisions of the Board applied. In their original libel, filed in the instant case, they claimed war bonus at the rate of \$100.00 per month under Decision No. 2 of the Maritime War Emergency Board. (4) When exceptions were sustained by the lower court to this reference to the Decisions of the Maritime War Emergency Board, appellants amended their libel and sought recovery of war bonus at the rate provided in the October, 1941, agreements (9, 15, 16). Appellants assert no error in the action of the trial court on these exceptions and do not urge the "Decisions" as incorporated by the Rider (Appellants' Brief, p. 39).

Maritime War Emergency Board Decision No. 2, made expressly retroactive to December 7, 1941, following the pattern of the industry, covered the subject of bonus in terms of "voyages." The Maritime War Emergency Board itself was set up while the "voyage" of the "CAPILLO" was still in progress, the vessel with its entire crew being at Manila, P. I., not having been destroyed until December 29, 1941, ten days after the appointment of the Board. It can be argued that Decision No. 2 of the Board dated January 10, 1942 (270) increasing war bonus had no application to this case as the "voyage" of the vessel had ended and the decision contemplated voyages then in progress. On the other hand, it may be likewise argued that Decision No. 2 and Decision No. 5, Revised, of the Board (270, 280) contemplated voyages which were in existence on December 7, 1941, which

would clearly embrace the case of the "CAPILLO." An "area" bonus of \$5 per day in addition to "voyage" bonus was first created by Decision 2A of the Board adopted Feb. 27, 1943. But even this "area" bonus was and is not payable unless a crew member is exposed to both a war and marine risk. See 1944 A.M.C. 1020, 1023. 1945 A.M.C. 1176, 1182.

As heretofore indicated the difference in the ultimate result is relatively immaterial as the appellants receive slightly less under the October Supplementary Agreements. We have tried to place all the pertinent facts before the court.

COMMENTS ON BRIEF OF APPELLANTS

No dispute in facts.

All parties are agreed that there are no disputed questions of fact, as appellants say on pages 2 and 29 of their brief.

Provisions of October supplementary agreements covering "marine cooks," "marine firemen" and "sailors" are identical save for the general introductory paragraphs.

On page 6 of appellants' brief, and repeated on pages 6, 7, 31, and 42, are statements that Exhibit A-3, the October Supplementary Agreement covering "marine firemen," differed from Exhibit A-4 covering "marine cooks" in that the former did not contain the following paragraphs included in the latter:

"In the event a vessel is interned, destroyed, or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective

bargaining agreement between the parties shall be paid to the date members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

* * * * *

"The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941, or upon *any voyage* to which the provisions herein are made applicable by special agreement or rider attached to shipping articles." (119, 114, 266)

All three October Supplementary Agreements covering unlicensed personnel contained these clauses.

Proctor for appellants upon having the matter called to his attention promptly notified the Clerk of this Court of this inadvertent error.

As stated in the earlier portion of this brief similar language is contained in the October Supplementary Agreements covering staff officers and licensed officers (259, 265, 266).

Exhibit A-12 emphasizes consideration given by Maritime War Emergency Board to *existing* collective bargaining agreements.

The remark on page 13 of appellants' brief that American Mail Line Ltd. "as one of the signatories to the Statement of Principles, did not follow this admonition of the Maritime War Emergency Board" to "destroy" the Decisions which were later com-

bined to make Decision No. 5, Revised (280), is not quite understood. It appears to be a criticism but the reason for same is not clear. The Decisions contained in Respondent's Exhibit A-12 (287) are certified to by the Secretary of the Maritime War Emergency Board as being "true, full and correct copies of the originals of the same held in my custody." They were introduced as showing the various steps which led to the ultimate adoption of the rules of the Board on compensation after the loss or internment of the vessel. The first Decision No. 5 of January 23, 1942, stated that in making this Decision the Board had "given careful *consideration* to * * * existing collective bargaining agreements" (288).

When Decision No. 5, Revised, dated February 21, 1942, was promulgated combining the original Decision and amendments, it contained the new rule first adopted on February 17, 1942, on payment of war *bonus after* loss or internment of the vessel (294). Decision No. 5, Revised, dated February 21, 1942, stated "The Board has given *additional* consideration to * * * existing collective bargaining agreements prior to writing these revisions" (280).

Exhibit A-12 was introduced merely to emphasize the continuing efforts of the Board to carry forward what it believed to be the general rules on the subject matter created by "existing" collective bargaining agreements. The October Supplementary Agreements were the most favorable "existing" contracts for the seamen on this subject and the Board adopted their rule on payment of bonus after loss or internment of the vessel while seamen were in the "war zones de-

fined herein," *i.e.*, while they were on a "voyage" in dangerous waters.

Date of decision in Case No. 80 of National Defense Mediation Board.

On page 18 of appellants' brief it is stated that the date when this decision was handed down "does not appear in the record." President J. B. Bryan of the Pacific American Shipowners Association testified concerning this subject: "This decision which is undated was rendered and distributed about October 6, 1941" (195).

The decision of the National Defense Mediation Board in Case No. 80 is significant in two respects: (1) It was the basis on which collective bargaining agreements were signed with unlicensed personnel on the Atlantic Coast (173) and on the Pacific Coast (195); (2) Following this decision minor adjustments had to be made on both Coasts to maintain the differential between licensed and unlicensed personnel (177, 196).

The decision is specifically mentioned in the introductory paragraphs of all October Supplementary Agreements covering unlicensed personnel (114, 119, 266). While the Board only made "Recommendations" these recommendations adopted the practice of the industry to describe bonus areas in terms of "voyages." Case No. 80 is of importance as a part of the whole history leading up to the subject matter of this litigation, particularly as these recommendations were accepted on both Coasts.

The agreement of August 16, 1941, was changed by Exhibits A-5 and A-6.

On page 20 of appellants' brief the statement is made that Exhibit B, the agreement of August 16, 1941, with licensed officers, was superseded by Exhibits A-5 and A-6 "although Mullins testified there was no other agreement (Aps. 178), only some recommendations by the commission." Mr. Mullins testified (177) that on the Atlantic Coast the rates for licensed officers provided by the contract of August 16, 1941, were raised because of the inequity created by the increase in the bonus to unlicensed personnel by Decision No. 80 of the National Defense Mediation Board. He testified that except for this increase the contract of August 16, 1941, remained unchanged until the War Emergency Board. He was, of course, speaking of the contract in so far as *his* Association was concerned (178). Mr. Bryan testified, concerning Pacific American Shipowners Association, that a corresponding increase in the rates of the contract of August 16, 1941, were made for the Pacific Coast and were incorporated in the October Supplementary Agreements, Exhibits A-5 and A-6 (259, 265) which on the Pacific Coast, of course, supplanted the agreement of August 16, 1941.

Rider will be interpreted to carry out the *general intent* to make supplementary agreements controlling.

The quotation on page 33 of appellants' brief to this effect is certainly good law.

The general purpose of uniformity is evident throughout the history of negotiations between the

parties in the latter half of the year 1941. The language of the first and last paragraphs of the Rider carry forward this trend. A construction which will support this "general" purpose is always favored.

Williston on Contracts, Revised Edition, §619:

"The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and if that is impossible an interpretation which gives effect to the *main apparent* purpose of the contract will be favored. Indeed in giving effect to the general meaning of a writing particular words are sometimes wholly disregarded, or supplied, or transported."

"§624. It was early laid down, that, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected. The same doctrine has been held in some modern cases applicable to contracts generally. * * * The *true rule* seems to be as stated in a Maine decision. * * *

" 'When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the *principal* or more *important* clause'."

Union Water Co. v. Lewiston, 101 Me. 564,
65 A. 67.

12 Am. Jur. 779:

"Where a repugnancy is found between clauses, the one which essentially requires something to

be done to effect the *general* purpose of the contract is entitled to greater consideration than the other. The whole agreement should, if possible, be construed so as to conform to an evident consistent purpose. Accordingly, a subsequent clause irreconcilable with a former clause and repugnant to the *general* purpose and intent may be disregarded."

Marx v. American Malting Co. (6 C.C.A.) 169 Fed. 582, 584:

"* * * Then, again, it is a fundamental rule in the interpretation of agreements that we should ascertain the prime *object* and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the *main* purpose. * * *"

Linde Dredging Co. v. Southwest Co. (5 C.C.A.) 67 F.(2d) 969, at p. 972.

An excellent example of the application of this rule is found in the following case:

Minnesota Tribune v. Associated Press (8 C.C.A.) 83 Fed. 350:

A contract between an association engaged in furnishing news, and a certain newspaper company, provided, in its seventh paragraph, "that the rights, duties, and obligations of the parties hereto, except as hereinbefore specifically provided for, shall be *controlled and governed by the by-laws* of the said party of the first part," etc. The court held, that the effect of this was to make the *subsequent provisions* of the contract subordinate to the by-laws, so that the ninth paragraph, which provided that the news association

should not extend its news service to any publications not then entitled to receive the same, without the written consent of the other contracting party, was controlled and modified by a provision of the by-laws which provided that newspapers entitled to receive news service from certain old associations on a given date should be entitled to have service extended to them *without* the consent of the local members. The court said (p. 354):

“* * * For the purpose of reaching a correct conclusion concerning the obligations imposed by the contract in question, it is clear, we think, that the contract should not be considered by itself, but should be construed in connection with the by-laws of the Associated Press. Reference is made to the by-laws in the contract, and the seventh paragraph thereof expressly declares ‘that the rights, duties, and obligations of the parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part, now or hereafter in force during the life of this contract.’ The necessary effect of this provision of the contract was to make the *subsequent provisions* thereof, including the ninth, subordinate to the by-laws. * * *”

The “general” intent of the Rider to the Shipping Articles of the “CAPILLO” was clearly to serve as an interim document until applicable supplementary agreements covering the subject matter should be negotiated which would thereafter govern (98, 154). Such October Supplementary Agreements were negotiated, by the terms of which the situation here presented was fully covered. Unless the last paragraph

of the Rider contemplates the incorporation of the Decisions of the Maritime War Emergency Board, the provisions of the October Supplementary Agreements clearly cover the instant case in all respects. Appellants' brief, on page 33, referring to provision covering compensation after loss or internment of the vessel virtually admits this is the fact by saying:

“* * * it may be possible to raise some argument on the Marine Cooks & Stewards agreement * * * in that there was provision both in the rider and the supplementary agreement relating to the length of time that war bonus is paid.”

It being now agreed that *all* October Supplementary Agreements had such a provision, this concession must be widened to cover all four appellants. Not only is it “possible to raise some argument” to that effect, but we submit that it is clear that the October Supplementary Agreements in the case of all four appellants clearly *supplant* the Rider in case of conflict.

War bonus—wages or not.

The cases discussed on pages 35 and 36 of appellants' brief are wholly without point in this discussion. There is no suggestion made in this brief that bonus when earned under the terms of the Rider to the Shipping Articles is not supported by adequate consideration.

The rider is valid where it incorporates a *negotiated* agreement even if subsequently made.

On page 37 of appellants' brief there is a suggestion that the Rider is invalid under 46 U.S.C. 564. This is, of course, not seriously urged as without the

Rider there could be no claim at all for bonus. There are two cases cited in support of the proposition that changes in wage schedules shown in shipping articles are illegal.

Jones v. United States (D.C. Md.) 284 Fed. 721;

The Howick Hall (D.C. La.) 10 F.(2d) 162.

Each contained a clause in the Shipping Articles purporting to make wages subject to later change in rates of pay.

In both cases the reduction in the scale of wages shown on the shipping articles was by the subsequent *unilateral* action of the employer. Here, the first and last paragraphs of the Rider explicitly refer to and incorporate outside agreements — possibly made in the future through *joint* action of the representatives of the parties. In the last case, above, the court said:

“* * * I have no doubt that, had the officers of the seamen’s unions and the shipowners’ association *reached an agreement*, both sides would have been bound by it, and the clause could have been given effect; but to allow the shipowner or the captain to arbitrarily reduce wages would be going too far, and to give the clause that meaning would render it void for lack of mutuality.”

Under October supplementary agreements bonus only payable while employees are in the “war zones defined herein.”

Appellants’ brief, page 42, discusses the provision in the October Supplementary Agreements that in case of loss or internment of the vessel,

“* * * war bonus at the rate specified in sub-

division (b) of paragraph 1 hereof shall be paid while employees are *in the war zones defined herein.*"

The brief says,

"This paragraph provided for the payment of a bonus to the men while in the war zone. * * *"

The brief *omits* the words "defined herein." The words "war zones" are specifically defined in the October Supplementary Agreements in the terms of "voyages" (119, 114). The brief continues:

"* * * Nothing is said about any *voyage*; nothing said about any services on the vessel.
* * *"

This, again, is not accurate as war bonus was specifically *only* to be paid "while employees are in the war zones *defined herein.*" The *definition* is wholly in the terms of "voyages." As indicated in the foregoing, this refers to a period while employees are exposed to the risks of a "voyage." It has no reference to the location of any employee while on *land*.

Decision No. 5, Revised, of Maritime War Emergency Board covers the subject matter when same is left open for *future* agreement.

The quotations on pages 44 and 55 of appellants' brief concerning the retroactivity of Decision No. 5 are not accurate or complete. As reproduced in appellants' brief it has *omitted* the language italicized below:

"This Decision is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's Articles en-

tered into on or before January 23, 1942, in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942, in the case of payments provided for in Article 4 hereof, and February 21, 1942, with respect to payments provided for in Article 6 hereof, *or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, or where the making of such payments were expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements.*" (281-2)

It is on the italicized language making it applicable where the subject was "expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements," that the trial court found it applicable here under the last paragraph of the Rider.

Rider to be construed against those who proposed and presented it.

The following cases cited on page 46 of the brief are hardly helpful in this discussion:

United States v. Westwood (C.C.A., Va.)
266 Fed. 696;

The Catalonia (D.C., Va.) 236 Fed. 554;

Jansen v. Theodore Heinrich, Fed. Cases
7215;

Wope v. Hemmingway, Fed. Cases, 18042;
The Disco, Fed. Cases, 3922.

They have to do with agreements in which the parties were not dealing on *equal* terms at arms' length. Such is not the situation here. The Rider here was not

prepared by the owner and presented to the crew. No ignorant seamen and overreaching master or owner are involved. It was a rider carefully prepared by very well informed unions and presented by them to American Mail Line Ltd. Under familiar rules of construction the Rider should be most strongly construed against the party who drew and presented the document.

In *Flotation Systems v. United States* (9 C.C.A.) 136 F.(2d) 483, the court said:

“It is the rule in California that the words of a contract will be taken most strongly against the party who employs them.”

The court adopted the same rule.

The rule thus enunciated is also the rule in Oregon and in Washington.

Hyland v. Oregon Co., 74 Ore. 1, 144 Pac. 1160;

Foss v. Golden Rule Bakery, 184 Wash. 265, 51 P.(2d) 405;

Dorsey v. Strand, 21 Wn.(2d) 217, 150 P. (2d) 702;

Southern Railway Co. v. Coco Cola (4 C.C. A.) 145 F.(2d) 304;

12 Am. Jur. 795.

In Restatement of the Law of Contracts, Sec. 236(d), the authors said:

“Where the words or other manifestation of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed unless their use by him is prescribed by law.”

Northern Pacific v. Twohy Bros. (9 C.C.A.)
 95 F.(2d) 220, cert. den. 304 U.S. 575;
 12 Am. Jur. 795.

Previous negotiations of the parties are admissible in interpreting the rider.

On page 46 of appellants' brief the following language is used:

"The admissibility of any evidence other than these agreements violates the parol evidence rule that all prior negotiations both oral and written, merge in the written agreement. * * *"

This is a repetition of similar language on page 29 of the brief. The authorities on the subject are to the contrary of the above language and such negotiations are clearly admissible.

Restatement of the Law of Contracts, §228:

"An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted."

§242: "*Previous negotiations* between parties to an integrated agreement, whether the negotiations relate to that agreement or to another, *are admissible* to show that the agreement has any meaning which is not impossible under the standard stated in §230 though that meaning would not otherwise have been given to the agreement."

§230 reads as follows:

"The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably

intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration other than oral statement by the parties of what they intended it to mean."

12 Am. Jur. 757:

"In the interpretation of a writing which is intended to state the entire agreement, *preliminary negotiations* between the parties *may*, however, *be considered* in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. The purpose of considering their preliminary negotiations is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself."

Authority of union to modify the contract.

On pages 47, 52 and 54 of appellants' brief the authority of the unions to modify an agreement is questioned.

The references on pages 47 and 48 to the following authorities:

31 Am. Jur. 874;

Ahlquist et al. v. Alaska-Portland Packers' Ass'n. (C.C.A. 9) 39 F.(2d) 348, 350;

The Henry S. Grove (D.C., Md.) 22 F.(2d) 444.

limiting the right of unions to modify individual agreements are not helpful in the instant discussion

for the reason that the Rider to the Shipping Articles on which appellants base their claim specifically provides in its opening and closing paragraphs that the "provisions" and "terms and effective date" of Supplementary Agreements to be *negotiated* between unions and Pacific American Shipowners Association are to govern the relationships of the parties. This is in line with the strong language of the Supreme Court of the United States in *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, at 338-9, where the court emphatically pointed out the present trend toward discouragement of individual agreements in favor of general collective bargaining agreements. The court said:

"But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. * * * The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. * * * We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. * * *

"* * * We know of nothing to prevent the employee's, because he is an employee, making any contract *provided* it is not *inconsistent* with a collective agreement or does not amount to or result from or is not part of an unfair labor practice.

* * *"

The Rider on bonus is certainly inconsistent with both the October Supplementary Agreements and the Decisions of the Maritime War Emergency Board.

Appellants argument on page 33 of their brief that the issues in this case are *not* between the Unions and the Association but between the crew and the operator is wholly without merit. The appellants, admittedly, are all members of the unions which made the October Supplementary Agreements (See Appellants' Brief, pp. 25, 29). The Rider incorporates the "provisions" and the "terms and effective date" of such supplementary agreements. Without incorporating the October Supplementary Agreements no contract at all exists and bonus would end when the vessel was lost.

At this point it may be well to emphasize the controlling character and uniform application of the *contracts* and *supplementary contracts* of the six maritime unions and Pacific American Shipowners Association. Testimony of W. L. Williams (110):

"Q. And when a ship would pay off, will you explain what governed the rights of the parties in case of dispute? A. The existing contract.

* * * * *

"Q. And those contracts in every case, would they govern as to who was right or wrong? A. They would." (111)

(134) "Q. (By MR. AMBLER): Mr. Williams,

referring to these contracts and the supplemental agreements which you have described and identified, were the crews of the various vessels of the American Mail Line which sailed out of the Columbia River governed by those contracts and supplemental agreements? A. They were. Q. And did you pay the crews in accordance with those? A. We did."

(153) "Q. The American Mail Line in the fall of 1941 had all of its vessels covered by agreements with the six Maritime Unions which are here mentioned? A. That is correct. Q. And it had no contracts with any other Unions during that period? A. It did not. Q. And all of its employees, seagoing employees, were covered by agreements with these six unions, is that correct. A. That is correct."

(155) "Q. (By MR. AMBLER): And all of your crews of all of your ships, during 1941 and before, did all of their collective bargaining through the Unions with the Association which represented your company? A. That is true. Q. And they were paid in accordance with these various agreements which were made between the unions, acting on behalf of the employees, and the Association, acting on behalf of the Employer, is that correct? * * * A. That is correct."

(156) "Q. (By MR. AMBLER): Will you state whether or not all crews of all vessels of the American Mail Line, during the period of 1940 and '41, were governed by agreements and supplemental agreements entered into by the Pacific American Shipowners Association on behalf of the Employer, and the six Maritime Unions representing the seagoing personnel? A. They were."

Invitation to the conference of August 12, 1941, and the introductory remarks of Commissioner Macauley are part of contract of August 16, 1941.

On page 49 of appellants' brief appellee is criticized for attaching to Exhibit B (the contract of August 16, 1941) the invitation of Admiral Land to the meeting and the opening remarks of Commissioner Macauley. Without these exhibits the contract is incomplete as it provided in part,

"At a conference terminating on this 16th day of August, 1941 * * *, to deal with the subject as announced by the Maritime Commission in the *attached* letters of invitation and statement made by Commissioner Macauley at the opening of the meeting on August 12, 1941, agreement was reached as follows:" (213)

Circular of American Merchant Marine Institute, Inc.

On page 51 of appellants' brief, the introduction of a Circular of August 18, 1941, of the American Merchant Marine Institute, Inc., to its members is criticized. It is interesting as a contemporaneous construction of the agreement of August 16, 1941, to which all of the October Supplementary Agreements relate made long before a dispute had arisen. The pertinent portion of the Circular is as follows:

"* * * The new agreement provides for continuance of basic wages and temporary emergency wages in case of internment, until arrival back in the United States, *but payment of bonus does not continue under such circumstances.*" (224)

Later general agreements are expressly incorporated by the rider.

It is quite true, as stated on page 57 of appellants' brief, that a general agreement between an association and unions does not become binding until adopted by the parties concerned. The quotation from *Clark v. Claremont Apt. Hotel Co.*, 19 Wn.(2d) 115, 122, 123, 141 P.(2d) 403, appears to state the general rule. The opening and closing paragraphs of the Rider, however, in this instance show a specific adoption of later negotiations by the parties concerned. The fact that these later negotiations may in certain respects result unfavorably to the parties concerned is immaterial. This is well illustrated in the *Clark* case. There a general agreement between apartment house owners and the union provided for a wage of \$125.00 a month. About a month following the execution of the general written agreement an oral agreement was made between an apartment house operator and the union covering Mr. Clark, by the terms of which his previous compensation was raised about \$22.00 a month, but fell short of the \$125.00 a month general wage, the reason for the differential resting on a variety of causes including the age of the plaintiff. In ruling against the plaintiff who sued for the difference between the amount he received and the amount provided under the general contract, the court said:

“* * * The appellant has not been injured by the oral contract; he has, in fact, been benefited thereby to the extent of twenty-two dollars a month. *If he takes the benefit of that contract, he must likewise be governed by its limitations.*”

Appellants have taken the benefits of the increased rates and coverage of the October Supplementary Agreements.

This same rule is recognized by the language of the first and last paragraphs of the Rider which clearly contemplate that the parties shall be governed by the “provisions” and the “terms and effective date” of general agreements. The suggestion contained on pages 7, 31 and 32 of appellants’ brief that only the increased “rate” of the Supplementary Agreements *without* all the accompanying “provisions” and “terms” should be applied is wholly untenable.

CONCLUSION

In conclusion, we submit that the decision of the trial court in finding that the Rider to the Shipping Articles of the “CAPILLO” incorporated the Decisions of the Maritime War Emergency Board is correct and the judgment below should be in all respects affirmed.

In the *alternative*, and only if the above is not the view of this court, we submit that the decision of the trial court should then be modified by finding that the Rider to the Shipping Articles incorporated the “provisions” and the “terms and effective date” of the October Supplementary Agreements, such modification resulting in the following changes in the judgment of the court below:

1. Disallowance to each appellant of the sum of \$14.67, granted by the court below.
2. Reduction of repatriation bonus to each appel-

lantlant by 20%, to-wit, from \$273.33 to \$218.66.

In all other respects the trial court should be affirmed.

Respectfully submitted,

JOHN AMBLER,

GROSSCUP, AMBLER & STEPHAN,

Proctors for Appellee.

October 29, 1945.

APPENDIX

October Supplementary Agreement Covering "Marine Cooks"—Appellee's Exhibit A-4 (119).

THIS AGREEMENT, dated October 10th, 1941, by and between the Marine Cooks and Stewards' Association of the Pacific Coast hereinafter referred to as the "Union" and the Pacific American Shipowners Association, a corporation, acting on behalf of the companies whose names are subscribed hereto.

WITNESSETH:

WHEREAS, a collective bargaining contract between the parties dated July 5, 1940, and which has been automatically renewed until September 30, 1942, specifically provides among other things for the establishment of bonuses and other special benefits on vessels going into war zones; and

WHEREAS, in a proceeding before the National Defense Mediation Board between certain other parties the National Defense Mediation Board published recommendations for bonuses for war risk to apply for a period hereinafter specified in this agreement; the parties hereto desire to adopt and follow said recommendations;

NOW, THEREFORE, It is agreed that said recommendations of the National Defense Mediation Board are adopted by the parties hereto and in pursuance thereto do agree as follows:

1. The following war bonus rules shall govern the parties hereto —

(a) There shall be five war zones; namely:

- I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States

ports via Indian and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

II. Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage).

III Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound).

IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound).

V. Canada (Atlantic Coast). (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port).

(b) Members of the Union shall be paid a war risk bonus at the rate of \$80 per month in the first four areas and \$33 in the fifth area provided, however, that all members of the Union entitled to receive basic monthly wages in excess of \$120, shall, in lieu of the bonuses specified above be paid at the rate of 66 $\frac{2}{3}$ % of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area; a schedule of such bonuses is attached hereto and made a part of this agreement.

(c) There shall be paid to members of the Union in addition to the area bonus just provided, the following port bonuses:

- (1) for the port of Suez, or any other port which is subject to regular bombing, \$100, plus \$5 per day for each day beyond five days that the vessel is in that port.
- (2) for any port in the Red Sea or in the Persian Gulf not covered by paragraph (1) *supra*. \$45.

The same bonuses shall be paid other unlicensed personnel.

The foregoing bonus rules shall be and remain effective until November 1, 1942, unless adjusted prior thereto pursuant to the provisions of this agreement.

2. The following machinery for making equitable future adjustments shall govern the parties hereto—

- (a) Either party may ask for a change, an addition to, or subtraction from the present war bonus rules set forth above if the present situation is changed by an Act of Congress, executive action, the spread or contraction of the area of hostilities in the Eastern or Western hemisphere, the entry into the war or withdrawal from the war of belligerents, or the rise or fall of sinkings of American vessels. Such proposed change shall be limited to the areas where conditions are alleged to have changed.
- (b) The party asking for the change shall present a request in writing to the party from whom the change is sought. Meetings shall be held at once. If agreement between them is not reached within one week after the date of such request either party may present the matter to the United States Department of Labor, Division of Conciliation, for conciliation. If conciliation is not successful within one week after the matter has been presented to the Division of Con-

ciliation, the Director of the Division may then refer the matter to a Board composed of three disinterested parties to be appointed by the President of the United States. Such Board shall have power to make recommendations.

- (c) In the event the parties are unable to agree concerning war bonus rules which shall apply on and after November 1, 1942, the procedure set forth in subdivision (b) of this Section 2 shall be followed in determining the same.

3. This agreement shall remain in effect until November 1, 1943.

4. War Risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement.

In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

5. During the period of these recommendations there shall be in connection with and on account of war bonus issues, no lockout, strike, slow-down, or like

action by either owners or men represented by the parties hereto.

6. The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941, or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles.

7. If any dispute shall arise concerning interpretation of said recommendations of the National Defense Mediation Board or any provision of this agreement and if the parties cannot adjust any dispute by agreement then either party may refer it to the Division of Conciliation for conciliation and if conciliation fails either party may refer the matter to the three-man Board referred to in paragraph 2 (b) hereof for interpretation.

PACIFIC AMERICAN SHIPOWNERS ASSOCIATION
(Sgd.) J. B. BRYAN, *President*

MARINE COOKS AND STEWARDS' ASSOCIATION
OF THE PACIFIC COAST
E. F. BURKE

DATED: October 10, 1941

Acting on behalf of the steamship lines named below:

Admiral Oriental Line

American-Hawaiian Steamship Company

American Mail Line

American President Lines, Ltd.

Alaska Steamship Company

Alaska Transportation Company

Coastwise Pacific Far East Line

W. R. Grace & Co (as Agents for Grace Line, Inc.

Pacific Coast West Coast Mexican Central

American Panama Service of Grace Line, Inc.)

and (Pacific Coast South American Service of
Grace Line, Inc.)

Luckenbach Gulf Steamship Company, Inc.

Matson Navigation Company

The Oceanic Steamship Company

McCormick Steamship Company

(East Coast-South American Service)

(Pacific Coast-Porto-Rico-West Indies Service)

(Intercoastal Service)

Northland Transportation Company

Pacific Lighterage Corporation

Pacific Republics Line

(Moore-McCormack Lines, Inc.)

Santa Ana Steamship Company

States Steamship Company

Pacific-Atlantic Steamship Company (Quaker Line)

Sudden & Christenson

(Arrow Line-Intercoastal Service)

Shepard Steamship Company

The Union Sulphur Company, Inc.

Weyerhaeuser Steamship Company

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,

Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

BRIEF OF AMICI CURIAE

JOHN GEISNESS,
BASSETT & GEISNESS,
Amici Curiae.

811 Alaska Building,
Seattle 4, Washington.

FILED

1930 MAY

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

BRIEF OF AMICI CURIAE

JOHN GEISNESS,
BASSETT & GEISNESS,
Amici Curiae.

811 Alaska Building,
Seattle 4, Washington.

INDEX

	<i>Page</i>
Interest of Amici Curiae.....	1
Statement of the Case.....	2
Summary of Argument	11
Argument	12
Basic Aids to Construction and Their Applica- tion to this Case.....	11
True Meaning of the Rider.....	17
Meaning of the October Agreements.....	22
Decisions of Maritime War Emergency Board....	24
Collective Bargaining Agreements Do Not Nega- tive More Advantageous Provisions of Ship- ing Articles	27
Conclusion	30

TABLE OF CASES

<i>Andrew Jergens Co. v. Woodbury, Inc.</i> , 273 Fed. 952, 959, Affirmed 279 Fed. 1016, Cert. Den. 260 U.S. 728, 67 L. ed. 484.....	12
<i>Brooklyn Life Insurance Co. v. Dutcher</i> , 95 U.S. 269, 24 L. ed. 410.....	26
<i>Burdon Central Sugar Ref. Co. v. Payne</i> , 167 U.S. U.S. 127, 42 L. ed. 105.....	12
<i>J. I. Case Co. v. N.L.R.B.</i> , 321 U.S. 332, 88 L. ed. 762	27, 28
<i>City of Chicago v. Sheldon</i> , 76 U.S. 50, 19 L. ed. 594	27
<i>E. I. Dupont de Nemours & Co. v. Claiborne-Reno Co.</i> , 64 F.(2d) 224, 89 A.L.R. 238.....	12
<i>Hammett Oil Co. v. Gypsey Oil Co. (Okla.)</i> 218 Pac. 501, 506	13
<i>Ladd v. Ladd</i> , 8 Howard 10, 12 L. ed. 967.....	12
<i>Minnesota Tribune v. Associated Press (C.C.A. 8)</i> 83 Fed. 350	16
<i>Mutual Life Insurance Co. v. Hill</i> , 193 U.S. 55, 48 L. ed. 788	14

	<i>Page</i>
<i>The Nicholson Pavement Co. v. Jenkins</i> , 81 U.S. 452, 20 L. ed. 777.....	12
<i>Oliver v. Alexander</i> , 6 Pet. 143, 8 L. ed. 459.....	29
<i>Peninsular & Occid. SS Co. v. N.L.R.B.</i> , 98 F. (2d) 411, Cert. Den., 305 U.S. 653, 83 L. ed. 423.....	29
<i>Sattler v. Hallock</i> (N.Y.) 54 N.E. 667.....	12
<i>Steinbach v. Stewart</i> , 78 U.S. 566, 20 L. ed. 56.....	26
<i>Stone v. Robinson</i> (Tex.) 180 S.W. 135.....	12
<i>Thomas v. Matthieassen</i> , 232 U.S. 221, 58 L. ed. 577	15
<i>U.P.R. Co. v. Hall</i> , 91 U.S. 343, 23 L. ed. 428.....	26

TEXTBOOKS

12 Am. Jur., 772, §241.....	13
12 Am. Jur., 779, §244.....	14
12 Am. Jur., 787, §249.....	27
Page on Contracts (2d Ed.) 3510, §2034.....	27
Page on Contracts (2d Ed.) 3525, §2040.....	13
Vol. I, American Law Institute Restatement, Contracts, §236	15
Williston on Contracts (Rev. Ed.) 1781, §619.....	13
Williston on Contracts (Rev. Ed.) 1784, §619, n. 12	15
Williston on Contracts (Rev. Ed.) 1792, §623.....	26

STATUTES

46 U.S.C.A. 564	29
-----------------------	----

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WIL-
LIAM A. PORTER and SAMUEL S. TAYLOR,

Appellants,

vs.

AMERICAN MAIL LINE LTD., a corpora-
tion,

Appellee.

No. 11100

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae represent the licensed personnel of the SS "CAPILLO" on the voyage involved in the instant case, excepting only the captain and the chief engineer. The rider attached to the shipping articles applies, of course, to the licensed personnel as well as to the appellants and other unlicensed crew members. The appellants were repatriated at an earlier date than other crew members. The licensed crew members represented by amici curiae, finding the instant suit pending when they returned, have held their claims in abeyance because, unless new facts unexpectedly develop or the decision on appeal rests upon some theory not now within our contemplation, the

outcome of this case should determine their right to bonus for the period of their imprisonment. At the very least, the licensed personnel have a direct and substantial interest in the pending appeal.

STATEMENT OF THE CASE

The case before the court has been stated by both appellants and appellee. We will not restate it in full, but will set forth only those matters that we consider necessary to a connected argument and as to which a ready reference in this brief may be a convenience to the court.

The articles of the SS "CAPILLO" signed October 11, 1941, bore an attached rider containing three sentences upon which the present case hinges:

"The American Mail Line agrees to pay an emergency war bonus to the crew of the S.S. Capillo, Voyage Six (6), in accordance with the provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various Marine Unions.

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a United States port on the Pacific Coast.

* * * * *

"It is further agreed that in the event of any

increase in pay, overtime or war bonus or changes in insurance which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners' Association, the company will be governed by the terms and effective date of any agreement so reached."

In the course of the voyage the crew was imprisoned for war causes and the crew members ask that the bonus be paid to them to the date they arrived in a United States port on the Pacific Coast. A glance at the second sentence of the rider would appear to confirm unqualifiedly their right to the bonus for such period, but the appellee has contended throughout the case that the second sentence must be read with the first and third sentences quoted above and in the light of negotiations, agreements and decisions preceding and subsequent to the execution of the articles, and that when so read appellants should be found entitled to bonus only until destruction of the ship December 29, 1941.

Appellants urge that attention should be confined to the rider itself, but for the sake of this argument we will assume that all of the evidence admitted by the trial court was properly admitted, believing that the total effect of such evidence is to confirm the right asserted by the crew members to war bonus throughout their period of imprisonment.

The form of the rider involved in this case was first used in August, 1941 (Aps. 105). It was proposed by the unions representing the various categories of personnel on American Mail Line ships and accepted by the American Mail Line (Aps. 106).

Thus, while the articles with the rider constitute a contract between each individual crew member and the ship operator, the rider was concurred in by the collective bargaining agents of the employees. Apparently the unions directly participated upon each occasion of its use (Aps. 109).

At the time the rider was developed there were in effect agreements between the Pacific Coast unions and the operators, referred to as supplementary agreements, treating specially with adjustments in compensation of seamen to meet the impact of war conditions upon the nature of the seamen's calling. As emphasized by appellee, these supplementary agreements not only were not uniform but were deemed insufficient by seamen of all categories, and hence, the unions demanded and the American Mail Line agreed that aside from such supplementary agreements there should be incorporated in the contract between individual crew members and company, evidenced by the shipping articles, the special stipulations found in the rider.

The last Pacific Coast supplementary agreements entered into prior to October 9, 1941, by unions representing unlicensed personnel were dated May 19, 1941 (Aps. 132-133). The latest Pacific Coast supplementary agreements applicable to licensed personnel prior to October 15, 1941, were dated August 16, 1941 (Aps. 166-167). Between October 9 and October 16, 1941, each of the several Pacific Coast maritime unions entered into a separate supplementary agreement with the operators (Aps. 133). The agreements reached between the operators and the unions repre-

senting the appellants were entered into on October 9 and October 10.

It is said that the agreements of October 9 and 10 were not known to the parties to the instant case when the articles of October 11, 1941, were signed (Appellee's brief, p. 24). On the other hand, there was no basic change in the situation and nothing to compel the conclusion that the rider would not have been appended to the articles had the parties known of those general agreements. There was a difference of degree in that the October agreements granted additional benefits and reached further toward achieving uniformity, although appellee does not contend that even substantial uniformity was achieved as to all United States seamen until December, 1941 (Appellee's brief, p. 26). Too, the appellee brings out that the October agreements for the first time expressly dealt with the subject of payment of war bonus to unlicensed personnel after discontinuance of a voyage due to war causes. The prior supplementary agreements with unlicensed personnel failed to deal expressly with the subject, but the August 16, 1941, agreement with licensed personnel did so (See Aps. 146, 216; Resp. Ex. B) and the licensed personnel nevertheless continued to demand and secured the attachment of the rider, applicable as well to them as to other crew members.

The general situation developed by the record respecting the Pacific Coast unions and their members was that for long prior to October 11, 1941, and to and including that date there were effective successive supplementary agreements, each generally ap-

plicable to the membership of a particular Pacific Coast maritime union, and that when it developed that the benefits accorded by the effective supplementary agreements were not sufficient to induce seamen to man the ships of the American Mail Line, the prospective crew members with the assistance of their unions entered into a special agreement evidenced by rider attached to the articles, giving the benefit of future collective agreements with certain independent guarantees. It cannot be said that the October agreement brought any essential change in the situation, even if we indulge, as we should not, appellee's assumption that the rider contemplated and was conditioned upon some expected agreement that would work a basic change.

Certain of the provisions of the October agreements should perhaps be quoted here because we sharply disagree with the appellee's interpretation of that portion of the October agreements relating to the payment of war bonus after discontinuance of a voyage due to war causes. So far as concerns the present argument, the October agreements were alike (Appellee's Brief, p. 52). A sample October agreement is set forth in the appendix to appellee's brief and also in *Apostles on Appeal*, pages 119 to 126. In numbered paragraph 1(a) of the agreement, war zones are established:

"1. The following war bonus rules shall govern the parties hereto—

"(a) There shall be five war zones; namely:

"1. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coast of Africa, Red Sea,

Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via Indian and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th. Meridian eastbound, and thereafter no further bonuses will be payable.)

“II. Trans-Atlantic voyages to Russian (Archangel, etc.) (Whole voyage).

“III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th. Meridian westbound, until recrossing the same Meridian east bound.)

“IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

“V. Canada (Atlantic Coast). (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port).”

In numbered paragraph 1 (b) general provision is made for payment of war bonus:

“(b) Members of the Union shall be paid a war risk bonus at the rate of \$80 per month in the first four areas and \$33 in the fifth area provided, however, that all members of the Union entitled to receive basic wages in excess of \$120, shall, in lieu of the bonuses specified above be paid at the rate of 66 2/3% of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area . . . ”

In numbered paragraph 4, the matter of compen-

sation after discontinuance of a voyage due to war causes is specifically treated:

“In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.”

Following the October agreements and at varying dates, certain further agreements were reached by the Pacific Coast unions and shipowners (Aps. 134) but these were basic agreements, providing increases in basic pay and not directly relating to war bonuses.

After the United States became at war, the unions and operators of both coasts agreed that a Maritime War Emergency Board should settle all questions in dispute between the maritime unions and operators and that its decisions should be final and binding (Exhibit K, Aps. 199-206).

Decision No. 2 of the Board classified war risk voyages and increased the bonus rate. It contained no provision respecting payment during internment (Exhibit A-10, Aps. 270 et seq.).

A succeeding decision numbered 5, as amended February 17, 1942 (Exhibit A-12, Aps. 287 *et seq.*) provides for payment of bonus after loss of a vessel during exposure to marine perils. Decision No. 5,

with its amendments, was consolidated into Decision No. 5, revised, issued February 21, 1942 (Exhibit A-11, Aps. 280). This decision of the Maritime War Emergency Board was by its terms:

“retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ships Articles entered into on or before — February 21, 1942, with respect to payments provided for in Article 6 hereof or collective bargaining agreements in effect at the time when ship’s articles were entered into as aforesaid, or where the making of such payments were expressly left open subject to later agreement either in the ship’s articles or such collective bargaining agreements.”

Article 6 pertained only to the subject of the continuance of war bonus payments after loss or internment of a vessel. These decisions do not expressly say that bonus shall *not* be paid during imprisonment.

Upon repatriation, appellants were paid by appellee war bonus of \$80.00 per month to December 29, 1941, the date the ship was lost. Appellee very evidently paid on the assumption that the October agreements applied both as to amount and period and did not authorize payment for any period following loss of the ship. Later, in excepting to the original libel appellee urged that the board’s decisions could not apply, and the proctor for respondent stated at the opening of the trial (Aps. 81) :

“It is further stipulated that if the libelants are entitled to recover, each is entitled to bonus at the rate of \$80.00 per month. It is also agreed

that the libelants have been paid their wages and emergency increase during the entire period until their arrival in New York; that they have been paid overtime; that they have been paid an attack bonus as provided in the supplemental agreements.

“It is also agreed that they were paid war bonus from the time the vessel crossed the 180th Meridian westbound, in accordance with the supplemental agreements in effect then, until the date when the vessel was sunk in Manila Harbor, December 29, 1941.” (Aps. 81)

Appellee did not pay bonus for the period of the repatriation voyage on the “GRIPSHOLM”. This would also seem to reflect its theory that the October agreements apply and its interpretation of those agreements. Appellee indicates that this payment was withheld on the ground that by reason of international protection travel on the “GRIPSHOLM” did not involve war risk, but it must be said that this suggestion is scarcely credible in view of its position in paying off and before the trial court. On the face of it, it is much more reasonable to assume that non-payment was prompted by appellee’s theory as to the interpretation and application of the October agreements.

The trial court added bonus for the repatriation voyage and increased the rate of bonus to \$100.00 per month, the amount fixed by the Board’s decisions.

It may fairly be said that the appellee’s conduct respecting war bonus up to the time of this appeal was consistent with the theory that the October agreements, not the Board’s decisions, applied both to

determine the rate of bonus and the period for which it should be paid. The trial court applied the Board's decisions to fix the bonus rate and period for which it should be paid.

SUMMARY OF ARGUMENT

If possible, every part of the contract should be given effect, all parts should be made to harmonize and no part should be rendered superfluous. General clauses are subordinate to special clauses. Under these rules, there was an unchanging commitment to pay war bonus throughout the period of imprisonment. No collective bargaining agreements were intended to, nor could they, subtract from this commitment.

ARGUMENT

Basic Aids to Construction and Their Application to this Case

Beginning at p. 56 of its brief, appellee states, with supporting authority, the general rule that the main purpose of the parties should, if possible, be followed in construing a contract. We agree as to the general proposition, but disagree as to the main purpose and meaning of the rider in question. It is our contention that the main purpose and meaning of the rider was to assure to the crew members war bonus payments throughout any period of internment or imprisonment at rates fixed by applicable supplementary agreements in effect when the rider was signed, together with *increases* later accorded by negotiation. We will shortly discuss the circumstances which we

believe give rise to this interpretation, but will first discuss certain recognized aids in the construction of contracts that also guide us to the same meaning.

It is well established that all parts of a contract are, if possible, to be given meaning and no part is to be treated as surplusage. In *Ladd v. Ladd*, 8 Howard 10, 12 L. ed. 967, the court said:

“By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and imperative, by giving effect to some clauses to the exclusion of others.”

In *E. I. Dupont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F.(2d) 224, 89 A.L.R. 238, the Circuit Court of Appeals for the Eighth Circuit said:

“If possible, a court will give effect to all parts of an instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable.”

See also:

The Nicholson Pavement Co. v. Jenkins, 81 U.S. 452, 20 L. ed. 777;

Burdon Central Sugar Ref. Co. v. Payne, 167 U.S. 127, 42 L. ed. 105;

Sattler v. Hallock (N.Y.) 54 N.E. 667;

Stone v. Robinson (Tex.) 180 S.W. 135;

Andrew Jergens Co. v. Woodbury, Inc., 273 Fed. 952, 959, Affirmed 279 Fed. 1016, Cert. Den. 260 U.S. 728, 67 L. ed. 484;

Hammett Oil Co. v. Gypsy Oil Co. (Okla.)
218 Pac. 501, 506;

Williston on Contracts (Rev. Ed.) Sec. 619,
p. 1781;

Page on Contracts (2d Ed.) p. 3525, Sec.
2040;

12 Am. Jur., p. 772, Sec. 241.

The foregoing rule of construction takes all force from appellee's argument that the rider incorporated that part of the October agreements prescribing the period during which war bonus should be paid, thereby negating the right to war bonus during periods of internment, under appellee's interpretation of the October agreements. One trouble with that argument is that it renders the second sentence of the rider meaningless. Appellee will respond that the parties did not know of the October agreements when the rider was signed and, therefore, did not know they were using a meaningless sentence in the rider. However, this will not hold water because the preceding supplementary agreements likewise contained no specific provision for payment of war bonus during internment and, therefore, according to appellee, did not authorize such payment (see appellee's brief, p. 44), so we would reach the same result by incorporating the prior May agreements. Further, when appellee argues that the first sentence of the rider incorporates in full future agreements, (Appellee's brief, 34), it plainly writes out the last sentence.

Another reasonable and well established rule of construction is that where a contract contains one

believe give rise to this interpretation, but will first discuss certain recognized aids in the construction of contracts that also guide us to the same meaning.

It is well established that all parts of a contract are, if possible, to be given meaning and no part is to be treated as surplusage. In *Ladd v. Ladd*, 8 Howard 10, 12 L. ed. 967, the court said:

“By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and imperative, by giving effect to some clauses to the exclusion of others.”

In *E. I. Dupont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F.(2d) 224, 89 A.L.R. 238, the Circuit Court of Appeals for the Eighth Circuit said:

“If possible, a court will give effect to all parts of an instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable.”

See also:

The Nicholson Pavement Co. v. Jenkins, 81 U.S. 452, 20 L. ed. 777;

Burdon Central Sugar Ref. Co. v. Payne, 167 U.S. 127, 42 L. ed. 105;

Sattler v. Hallock (N.Y.) 54 N.E. 667;

Stone v. Robinson (Tex.) 180 S.W. 135;

Andrew Jergens Co. v. Woodbury, Inc., 273 Fed. 952, 959, Affirmed 279 Fed. 1016, Cert. Den. 260 U.S. 728, 67 L. ed. 484;

Hammett Oil Co. v. Gypsy Oil Co. (Okla.)
218 Pac. 501, 506;

Williston on Contracts (Rev. Ed.) Sec. 619,
p. 1781;

Page on Contracts (2d Ed.) p. 3525, Sec.
2040;

12 Am. Jur., p. 772, Sec. 241.

The foregoing rule of construction takes all force from appellee's argument that the rider incorporated that part of the October agreements prescribing the period during which war bonus should be paid, thereby negating the right to war bonus during periods of internment, under appellee's interpretation of the October agreements. One trouble with that argument is that it renders the second sentence of the rider meaningless. Appellee will respond that the parties did not know of the October agreements when the rider was signed and, therefore, did not know they were using a meaningless sentence in the rider. However, this will not hold water because the preceding supplementary agreements likewise contained no specific provision for payment of war bonus during internment and, therefore, according to appellee, did not authorize such payment (see appellee's brief, p. 44), so we would reach the same result by incorporating the prior May agreements. Further, when appellee argues that the first sentence of the rider incorporates in full future agreements, (Appellee's brief, 34), it plainly writes out the last sentence.

Another reasonable and well established rule of construction is that where a contract contains one

clause particularly relating to a specific subject matter and also contains a general clause dealing with several matters including the subject matter of the specific clause, the general clause will be subordinate to the specific clause. In 12 Am. Jur. p. 779, sec. 244, this rule is well stated:

“As a rule, where in an agreement there are general and special provisions relating to the same thing the special provisions control. When the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought.”

Mutual Life Insurance Co. v. Hill, 193 U.S. 55, 48 L. ed. 788, a case arising from the District of Washington, dealt with a question bearing a close analogy to the instant case. There a life insurance policy contained express provision that the company assumed no responsibility for notice to policy holders of premiums due. The policy also contained a provision that the contract should be held and construed at all times and places to have been made in the City of New York. A statute of New York forbade forfeiture of any life insurance policy without notice. In holding that the specific clause of the contract was the controlling clause, the Supreme Court said:

“The ordinary rule in respect to the construction of contracts is this: That where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general

in its terms, although within its general terms the particular may be included. Because, when the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. Here, when the parties stipulate that no other notice shall be required, attention is directed to the particular matter of notice. When the stipulation is that the contract shall be construed to have been made in New York, no particular statute is referred to, and the attention may not be directed to the matter of notice or any other special feature of New York law. The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents — contracts as well as statutes.”

See also:

Thomas v. Matthieassen, 232 U.S. 221, 58 L. ed. 577;

Vol. I, American Law Institute Re-Statement, Contracts, Sec. 236;

Williston on Contracts (Rev. Ed.) Sec. 619, p. 1784, n. 12.

Here, the rider specifically provides that “in the event the * * * crew be * * * imprisoned * * * the company agrees to pay bonus to the date members of the crew arrive in a United States port, on the

Pacific Coast." This provision of the rider specially dealing with the single subject matter plainly dominates as to that single subject matter the general clauses incorporating, by reference, terms of other agreements.

This is an appropriate place to speak of *Minnesota Tribune v. Associated Press* (C.C.A. 8) 83 Fed. 350, a case relied upon rather strongly by the appellee. That case involved a contract containing in its seventh paragraph a provision that "the rights, duties, and obligations of the parties hereto, except as hereinbefore specially provided for, shall be controlled and governed by the by-laws of said party of the first part, now or hereafter in force during the life of this contract". By reason of this particular form of language, the court said that "the necessary effect of this provision of the contract was to make the subsequent provisions thereof, including the ninth paragraph, subordinate to the by-laws". The sense of the decision is that the parties, by excepting specific provisions occurring *before* the seventh paragraph, said in effect that the by-laws would control even specific provisions of the contract occurring after the seventh paragraph. Were this not the sense of the decision it would, of course, be contrary to the well established rule we have just discussed. We hardly think the court was ignorant of that basic rule of construction and certainly indicated no intention to set it aside, but rather considered the case to be one to which, by reason of the special language we have quoted, the rule did not apply.

True Meaning of the Rider

It is the substance of appellee's contention, as we read its brief, that the rider in question was conceived in anticipation of general agreements that would accord satisfactory adjustments in war compensation, would be uniform in their application, and would deal directly with compensation during imprisonment or internment, and that the rider was designed and intended to incorporate the whole of such general and uniform arrangements regardless of conflict with the specific provision of the rider upon which appellants base their case. As we have shown, this argument runs foul of basic established principles that should govern the interpretation of contracts. Furthermore, entirely aside from those principles, appellee's inference from the circumstances as to the meaning of the parties is not reasonable.

The appellants, their fellow crew members and crew members previously signing articles bearing the rider in question were departing to be in war zones exposed to unusual hazards for undetermined periods. They knew that there were general contracts in effect between their respective unions and the American Mail Line providing certain compensation for war risks. They were dissatisfied with the compensation so provided and were unwilling to sail without assurance of greater benefits. They knew, too, that negotiations were almost continuously being conducted between the unions and the ship operators, that a series of special and general agreements had been reached and that further agreements would no doubt be reached in the future. As we read the rider, they

met the situation as one would naturally expect, by demanding (1) that they be paid war risk compensation in accordance with the applicable supplemental agreements in existence at the time they signed the rider (first sentence of rider); (2) that no matter what agreements had been or might be made they be paid wages and bonus during any period of internment or imprisonment (second sentence of rider); and (3) that in the event wages or war bonus should be increased, the increases would be applicable to them (last sentence of rider). They did not intend to limit themselves to the war compensation accorded by existing agreements, nor did they intend to place themselves subject to all the provisions of whatever future agreements might be made. They would not sail without being assured that they would be paid wages and bonus during any period of imprisonment and that they would not be subject to any decrease in bonus or wages but only to increases.

It will be noticed that this interpretation gives a distinct meaning to each of the three sentences under scrutiny and gives force and effect to the specific provision for bonus payments during imprisonment in spite of the general references in the other two sentences to independent collective agreements.

We submit that the interpretation we urge is the only sensible interpretation that gives effect to all parts of the rider. Appellee's argument hopelessly fails to do so. It is argued by Appellee that the phrase "applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions," as used in the first

sentence of the rider, refers not only to those in existence at the time the articles were signed but to those that might come into existence in the future. (See pp. 32 to 38 of appellee's brief). It is at once apparent that this interpretation denies meaning to the last sentence of the rider. Further, the necessary, and apparently the intended, import of appellee's argument is that the rider supplanted itself by existing and future agreements (See pp. 32-38 and 71-72 of appellees' brief). This construction plainly writes the second sentence out of the rider.

In this connection, it must be remembered that none of the May, August and October agreements expressly provided that no bonus should be payable for periods of imprisonment ashore. Appellee does not contend otherwise but argues that none of those agreements provides for such compensation and for that reason it is not collectible under any of them. It follows that, since all agreements, according to appellee, deny war bonus during imprisonment in a like manner, incorporation into the articles of any of the agreements would, if we follow appellee, deny war bonus during periods of imprisonment ashore, so that the second sentence of the rider, if appellee is right, never had nor could have force.

The basic defect in appellee's argument is that it assumes that appellants must adopt all or none of the provisions of supplementary agreements. It is baldly asserted by appellee on p. 72 of its brief that it is "wholly untenable" to apply the increased rate of compensation found in the supplementary agreements without applying all of the other pro-

visions of those agreements and excluding the rider. On the contrary, it is not only tenable to do so but it is the only tenable thing to do. Otherwise, we must assume that by accepting the supplementary agreements in the first sentence of the rider they would necessarily have barred themselves from taking the benefit of the second sentence, even had the October agreements, unknown to them October 11, 1941, never been adopted. For this and for the other reasons we have already discussed, it seems very clear that what the parties meant to do and what they did do was provide that the crew members should be paid in accordance with current supplementary agreements; that in addition to any stipulations in the supplementary agreements they should be paid bonus during internment; and that they should have the benefit of any increases in bonus accorded by subsequent agreements.

And assuming that appellee can reconcile with its argument any theory under which the second sentence of the rider ever had or could have any meaning at all, its argument necessarily implies that when the crew of the "CAPILLO" signed articles containing the express stipulation that war bonus should be paid to them throughout any period of internment despite the failure of existing collective bargaining agreements to provide such compensation during such periods, they were also agreeing that if in a day or a week or a month or a year another collective bargaining agreement should be reached containing some increase in rates but likewise denying bonus during imprisonment, the specific protective clause they had

insisted upon in the rider would be out of the window and they would be entitled to no bonus during imprisonment. After all, what we are ultimately interested in is the intention of the parties and specifically the intention and understanding of one party which must have been comprehended by the other. It seems too plain for argument that the crew could not possibly have intended any such possibility and that the American Mail Line must have known well enough that there was no such intention. The crew members believed that, come what might, they would be entitled to bonus during imprisonment at current or increased rates. They confidently computed their bonus during imprisonment and have now been told that by reason of a wholly artificial and untrue implication gratuitously drawn from a general background of collective negotiations and agreements, they are to be denied that which they required to be specifically promised them as a condition of their sailing.

The appellee's whole argument rests upon the assumption that the articles bearing the rider were signed in contemplation of some uniform and satisfactory general agreements by which the crew expected to be bound. The October agreements are acclaimed by appellee as those for which seamen had been waiting and it is concluded that the intention of the rider was to adopt every part of those agreements and discard inconsistent stipulations in the rider. It is said that "the 'general' intent of the rider to the shipping articles of the *CAPILLO* was clearly to serve as an interim document until applicable supplementary agreements covering the subject mat-

ter should be negotiated which would thereafter govern (98, 154). Such October supplementary agreements were negotiated, by the terms of which the situation here presented was fully covered."

There is nothing to support appellee's assumption as to the general intent of the rider. The very apparent intent was to secure wages and bonus at the going rates, together with future increases, and to have both wages and bonus during any period of imprisonment.

Meaning of the October Agreements

Appellee contends that the October agreements negative the right to bonus during imprisonment. This is said to be true because the October agreements provide that bonus shall be paid while in the defined war zones and the term "war zone" is taken by appellee to mean only a "voyage" in certain waters, so that when the voyage ends with loss of the vessel, the war zone ends. This interpretation is plainly open to objection because the agreement does not in any sense say that a zone is a voyage but says, in substance, (Par. 1 (a) that respecting a voyage of the type here in question, the vessel is in a war zone after crossing the 180th Meridian westbound until re-crossing the same meridian eastbound. The agreement next (Par. 1 (b) provides generally that bonus shall be paid at stipulated rates in the "areas", and in an entirely separate paragraph (Par. 4) provides:

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective

bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

It is at once apparent that if appellee's interpretation of the second quoted sentence is correct, the sentence is nugatory. It would mean no more than to say that crew members should be entitled to bonus while in one of the war zones and in the course of the voyage. Exactly that much, at least, had already been said in the earlier provision of the contract to which we have already referred. In view of the existence of that prior provision and also in the light of the paragraphing and context, it is crystal clear that the quoted paragraph was intended to apply to those cases in which a vessel discontinued a voyage as a result of war operations. Applying appellee's interpretation, the second sentence of the quoted paragraph is a promise that the operators, for periods following discontinuance of voyages, will pay war bonus during continuance of voyages. Of course, the common sense interpretation of the October agreements is that on voyages into certain areas, the war bonus will be paid, and that in the event such a voyage is discontinued, the seamen will be paid war bonus while in those areas in which a crew, if voyaging therein, is entitled to bonus. The rider goes a relatively small step further to assure bonus until return to the Continental United States.

Appellee attempts to show the difficulties of applying such an interpretation by pointing out that the appellants did not return westbound across the 180th Meridian and, therefore, never literally left the area (p. 43 of appellee's brief). This type of argument is perhaps best answered by pointing out that similar difficulties of interpretation may be encountered in connection with westbound voyages that continue westerly into non-bonus waters. We believe the authors of the October agreements would probably respond that while their agreements might be more precise in their definition of war zones, the possibility that a crew might receive bonus while in a certain location provided they approached it from one direction rather than another is an unreasonable conclusion that it should be possible to dispel by common sense interpretation without its being literally treated in the agreement.

And, as we have already argued, even if appellee's interpretation of the October agreements respecting payment during imprisonment were correct, the outcome of this case could not be affected, because no matter what provision may be contained in the supplementary agreements, the rider insures to the men payment of bonus during such periods.

Decisions of Maritime War Emergency Board

The assumption of the court and the argument of appellee (on appeal only) is that the decisions of the Board were negotiated agreements because they stemmed from a collective agreement that the decisions should be binding. It follows that if our argument is valid that the rider insures bonus during

imprisonment no matter what agreements may subsequently be made, that argument is equally valid as applied to the decisions of the Board. If they enter the case at all, they enter it as agreements and have no independent force.

In addition, it appears that the critical decision, Decision No. 5, revised, was not, by its terms, to be effective as to the voyage in question. It was declared to be retroactive to December 7, 1941 in certain cases. While the provision of the decision relating to effective dates is rather involved, the apparent meaning, so far as material here, is that with respect to Article 6, the part pertaining to war bonus payments after loss or internment of a vessel, the decision was to be effective as of December 7, 1941 in cases where neither ships articles entered into on or before February 21, 1942 nor collective bargaining agreements in existence when such articles were entered into contained provision respecting payment of war bonus after loss of the vessel, or where either the articles or the agreement expressly provided that the making of such payments should be left open for later agreement.

We understand that appellee's interpretation of the above-mentioned part of the decision pertaining to the effective date is in accord with what we have just said as to our own. Appellee proceeds to argue that this case falls within the very last clause of the provision because, according to appellee, "the making of such payments" was "expressly left open subject to later agreement . . . in the ships articles." This argument is unsound. The ship's articles left partially

open for adjustment (upwards only) the *amount* of the bonus but did not leave open the "making of such payments". Furthermore, Article 6, the clause claimed by appellee to be retroactive under the provision we have mentioned, does not relate to the *amount* but only defines the periods during which bonus shall be payable after discontinuance of a voyage due to war causes, which makes it clear that when reference is made to "*the making of such payments*" being left open, the Decision does not deal with a case where the *amount* was left open but deals only with cases where the *right* to bonus following loss or internment of the vessel, irrespective of *amount*, was expressly left open, the *right* to bonus under those conditions, not the *amount*, being the subject matter of Section 6.

It is certainly beyond argument that the *right* to bonus after loss, destruction, or abandonment of the vessel was not expressly left open. Quite the contrary was true.

Finally, it has been said by the Supreme Court that if there is doubt as to the meaning of a contract, the practical construction placed upon it by the parties "is an aid that may always be called in" (*Steinbach v. Stewart*, 78 U. S. 566, 20 L. ed. 56), is "of weight" (*U.P.R. Co. v. Hall*, 91 U.S. 343, 23 L. ed. 428), is "always a consideration of great weight" (*Brooklyn Life Insurance Co. v. Dutcher*, 95 U.S. 269, 24 L. ed. 410).

In Williston on Contracts (Rev. Ed.) sec. 623, p. 1792, the author says:

"The interpretation given by the parties them-

selves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered."

See also Page on Contracts (2d Ed.) Sec. 2034, p. 3510; 12 Am. Jur. Sec. 249, p. 787; and *City of Chicago v. Sheldon*, 76 U.S. 50, 19 L. ed. 594, where the court said that the practical construction by the parties of an ambiguous contract is entitled to great, if not controlling, influence.

At the time appellants were paid off by appellee, appellee rejected the applicability of the Board's decisions, took the same position in this cause by contending, in support of exceptions to the original libel, that appellants could base no rights upon the decisions of the Board, and finally stipulated that if appellants recovered, their recovery should be limited to the \$80.00 per month provided by supplementary agreement, not the \$100 per month fixed by Board decisions and awarded by the trial court. Upon this appeal appellee half heartedly advances the contrary view but in doing so obviously is inspired by the decision of the trial court and its independent construction was plainly indicated by words and conduct to be that the Board's decisions have no application.

Collective Bargaining Agreements Do Not Negative More Advantageous Provisions of Shipping Articles

A discussion of this subject is invoked by appellee's reference to *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 88 L. ed. 762. While appellee's position on the point is not clearly made and it perhaps does not intend

to argue that the crew members can in no event have more than collective bargaining agreements accord them, such a position is at least intimated on pp. 67 and 68 of appellee's brief, and for that reason, we think the point merits discussion.

In the *J. I. Case Co.* decision, the Supreme Court held that an individual agreement, inconsistent with a collective bargaining agreement and amounting to an unfair labor practice, could not be made. The language of the opinion admits the possibility that an individual employee may be denied benefits under individual agreement greater than those accorded by the collective agreement. However, the court is careful to state that such a result is not necessarily the case. This phase of the court's opinion is discussed in an able annotation in 88 L. ed. 770 where the author says, at p. 787:

"Whether an individual employment contract is valid or invalid to the extent that it contains provisions more favorable to the employee remains an open question. See *J. E. Case Co. v. National Labor Relations Bd.* (reported herewith), where the court pointed out that it was not called upon to decide that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, and said: 'Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable, and to the Labor Board if they constitute unfair labor practices'."

Aside from the above-quoted comment, it should be

remembered here that the rider in question is not merely an individual bargain but, as appellee itself states in its brief, (p. 64) was brought into existence by the unions, the collective bargaining agents. It was no less the result of collective bargaining than were the more general supplementary agreements. Thus, while the shipping articles, which include the rider, constitute a several contract with each seaman (*Oliver v. Alexander*, 6 Pet. 143, 8 L. ed. 459; *Peninsular & Occid. SS Co. v. N.L.R.B.*, 98 F.(2d) 411, Cert. Den., 305 U.S. 653, 83 L. ed. 423), they also evidence a collective bargain.

In addition to the foregoing, and whatever rule may be applicable to individual contracts in other employment relations where collective agreements also exist, it seems plain that in the light of 46 U.S.C.A. 564, no collective agreement may derogate from the rights of a seaman under shipping articles. Under 46 U.S.C.A. 564, the contract of employment of seamen must be in writing, as near as may be in the form prescribed by statute, must be signed by the master before any seaman signs the same and must provide, among other things, the amount of wages each is to receive. In short, seamen must serve under shipping articles which must stipulate the amount of their wages. In the light of this statute, the court, in the *Peninsula & Occid. Ss. Co.* case, *supra*, said:

“Not only would the company have the right to make individual contracts, evidenced by the shipping articles but was required by law to do so.”

We submit that a steamship operator may not in reliance upon a collective agreement not expressly incorporated in the shipping articles pay wages less than those stipulated in the articles.

Thus, we return ultimately to the meaning of the rider. If the rider meant, as we respectfully urge that it did mean, that the members of the crew were to receive bonus during imprisonment despite what collective agreements might provide, they are not to be deprived of this advantage no matter what interpretation may be placed upon the October agreements and the decisions of the Maritime War Emergency Board.

CONCLUSION

The crew of the "CAPILLO" joined the vessel in reliance upon an express and unqualified stipulation that they would be paid war bonus for periods of imprisonment following loss or destruction of the vessel. They suffered under long periods of imprisonment by the Japanese under conditions that have been graphically described to us all. Money cannot compensate for the suffering they underwent but, in terms of money, it would require incomparably more to compensate them for their imprisonment than for shipboard life and duties. They, of course, counted upon the express stipulation in the rider, and during their long suffering in prison camps derived some distraction and solace from thought of their accumulating wages and bonus and from computing the amounts accruing to them. Now to tell them, as appellee has, that for elaborately involved reasons

they are not to be paid what in plain language was promised them, is, we respectfully submit, to do a very shocking thing. It is not merely that one's sympathies are naturally aroused by the plight of the surviving members of the crew and their families, but it instantly springs to mind that law justifying such a result is a shockingly poor kind of law. We believe the very fact that the crew members would naturally expect to be paid the bonus during their imprisonment, entitles them to such payment. Construction of contracts is not an artificial process but is merely the process of arriving at the meaning the parties must have assumed the contract to have. Anyone, including appellee, would certainly believe that the crew would expect bonus during imprisonment and that is the basic reason they are entitled to it.

Respectfully submitted,

JOHN GEISNESS,

BASSETT & GEISNESS,

Amici Curiae.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

PETITION FOR REHEARING

JOHN AMBLER,
GROSSCUP, AMBLER & STEPHAN,
Proctors for Appellee.

807 Central Building,
Seattle 4, Washington.

FILED

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

PETITION FOR REHEARING

JOHN AMBLER,
GROSSCUP, AMBLER & STEPHAN,
Proctors for Appellee.

807 Central Building,
Seattle 4, Washington.

INDEX

	<i>Page</i>
Preliminary	1
I. No issue is taken in this petition for rehearing on ruling of this court that decisions of Mari- time War Emergency Board do not apply to in- stant case	2
II. October Supplementary Agreements do not contemplate payment of war bonus during in- ternment of crew ashore.....	3
III. Questions on which rehearing is sought.....	4
Importance of questions involved.....	4
IV. Errors in the court's decision.....	7
(a) October Supplementary Agreements are "in effect" from their effective date, not merely from their date.....	7
Practical causes necessitating such riders	10
Present decision of the court denies mem- bers of two unions the right to the higher bonus rates of the October Supplement- ary Agreements.....	12
(b) All the "provisions" of the October Sup- plementary Agreements apply not <i>merely</i> to the bonus rate of the October Supple- mentary Agreements.....	13
Rate of war bonus and limitation thereon are parts of the same agreement.....	16
(c) Court has ignored last paragraph of Rider	20
Rider is unequivocal that "provisions" and "terms" of supplementary agree- ments shall apply—no saving of more fa- vorable <i>existing</i> rights.....	22
American Mail Line, Ltd., not owner of the S.S. "Capillo"	23
Appendix A.....following page	25
Rider to Articles.....Appendix	1
Appendix B.....Appendix	3
Unlicensed Personnel.....Appendix	3
Licensed Personnel and Staff Officers....Appendix	4

TABLE OF CASES

	<i>Page</i>
<i>The Howick Hall</i> (D. C. La. 1925) 10 F. (2d) 162....	11
<i>Jones v. United States</i> (D. C. Md. 1922) 284 Fed. 721	11

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11100

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM
A. PORTER and SAMUEL S. TAYLOR
Appellants,

vs.

AMERICAN AIR LINE LTD., a corporation
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:

Comes now American Mail Line Ltd., appellee in the
above entitled action, and respectfully petitions this
court for a rehearing upon the grounds and for the
reasons hereinafter set forth:

PRELIMINARY

This is an action by four members of the crew of the
S. S. CAPILLO who were repatriated on the M. S.
GRIPSHOLM to New York in December, 1943, for

war bonus during their internment ashore by the Japanese and for transportation from New York to the Pacific Coast under paragraph 2 of a Rider to the Shipping Articles of the vessel. The trial court denied recovery and this court has reversed the action of the trial court. (The Rider is reproduced verbatim in Appendix A.)

I.

NO ISSUE IS TAKEN IN THIS PETITION FOR REHEARING ON RULING OF THIS COURT THAT DECISIONS OF MARITIME WAR EMERGENCY BOARD DO NOT APPLY TO INSTANT CASE

We take no issue in this petition for rehearing with the ruling of this court that Decisions of the Maritime War Emergency Board are not controlling in this case. The trial court, upon appellee's exceptions to the original libel, which urged the applicability of such Decisions, struck all references thereto (Ap. 9, 15). Appellee has never urged the applicability of these Decisions (Ap. 81). The Decisions of the Maritime War Emergency Board were merely introduced to show that the Board "after careful" and "additional" consideration to "existing collective bargaining agreements" adopted the rule of the *then current* collective bargaining agreements on both coasts that *no war bonus* was payable during internment of a crew ashore (Ap. 280, 288; Brief of Appellee, pp. 53-55). This has been the rule throughout the war (Brief of Appellee, pp. 30-31).

II.

OCTOBER SUPPLEMENTARY AGREEMENTS DO NOT CONTEMPLATE PAYMENT OF WAR BONUS DURING INTERNMENT OF CREW ASHORE

The court holds:

“ * * * It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles. * * * ”

This statement means that the following language contained in both the October Supplementary Agreements of appellee with the Marine Firemen, dated October 9, 1941, and that with the Marine Cooks, dated October 10, 1941, does *not* require the payment of war bonus during internment of the crew ashore.

“In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the *basic* wages and *emergency* wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War *bonuses* at the rate specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the *war zones defined herein*.” (Ap. 123, 114. Emphasis ours)

A considerable portion of the brief of appellee on this appeal was devoted to showing that the above quoted language from the October Supplementary Agreements did not contemplate payment of bonus during internment of the crew ashore (Brief of Appellee, pp. 38-48, inc.).

The identical quoted language is also contained in the agreement between appellee and the Sailor's Union (Ap. 266. See Appendix B).

Almost identical language is contained in the agreements between appellee and the licensed officers and between appellee and the American Communications Association Radio Operators (Ap. 259, 265, 266. Appendix B).

(For the convenience of the court we are quoting in Appendix B the exact language of *all* October Supplementary Agreements on this subject.)

As the so-called October Supplementary Agreements between appellee and the six maritime unions contemplate that *no war bonus* is payable during internment of a crew member ashore, if these Supplementary Agreements supplant the language of the second paragraph of the Rider to the Shipping Articles of the S/S Capillo this court must revise its opinion and deny appellants' recovery.

III.

QUESTIONS ON WHICH REHEARING IS SOUGHT

Appellee takes strenuous issue with two phases of the decision of this court. We believe that the following discussion will convince the court that its decision should be both *reconsidered and changed*.

Importance of Questions Involved

This case is important to the Shipping Industry—to employers and employees alike.

(1) It is believed that it is the *first* case to reach an Appellate Court on the construction of Riders to the Shipping Articles.

(2) We believe it is the *first* case to reach an Appellate Court on the question of payment of war bonus during internment of a crew ashore.

The solution of the case hinges on what the Unions and the appellee, *at the time* of its *adoption*, meant by a Rider to the Shipping Articles of the S. S. CAPILLO.*

* The testimony is wholly uncontradicted and it is a matter of general knowledge that for years wages and working conditions have been negotiated on an industry wide basis between the employers and the unions, not on an individual vessel basis.

"Q. (By MR. AMBLER): Mr. Williams, referring to these contracts and the supplemental agreements which you have described and identified, were the crews of the various vessels of the American Mail Line which sailed out of the Columbia River governed by those contracts and supplemental agreements? A. They were. Q. And did you pay the crews in accordance with those? A. We did." (Ap. 134)

"Q. The American Mail Line in the fall of 1941 had all of its vessels covered by agreements with the six Maritime Unions which are here mentioned? A. That is correct. Q. And it had no contracts with any other Unions during that period? A. It did not. Q. And all of its employees, seagoing employees, were covered by agreements with these six unions, is that correct. A. That is correct." (Ap. 153)

"Q. (By MR. AMBLER): And all of your crews of all of your ships, during 1941 and before, did all of their collective bargaining through the Unions with the Association which represented your company? A. That is true. Q. And they were paid in accordance with these various agreements which were made between the unions, acting on behalf of the employees, and the Association, acting on behalf of the Employer, is that correct? * * * A. That is correct." (Ap. 155)

"Q. (By MR. AMBLER:) Will you state whether or not all crews of all vessels of the American Mail Line, during the

The decision in this case will have a profound influence on the interpretation of Riders to Shipping Articles, which are so common at this time. This is a test case which will probably decide the rights of the entire crew of the S. S. CAPILLO (not merely the four here actually concerned) on the subject of war bonus during their internment ashore. This case will have a strong bearing on the question of payment of war bonus to crews of other vessels during their internment ashore.

We respectfully submit that the court has misconstrued the first paragraph of the Rider reading as follows:

“The American Mail Line agrees to *pay* an emergency *war bonus* to the crew of the S. S. *Capillo*, Voyage 6, in accordance with *provisions contained in the applicable supplementary agreements in effect* between the Pacific American Shipowners’ Association and the various Marine Unions.” (Emphasis ours)

We respectfully submit that the court has wholly ignored paragraph 6 of the October Supplementary Agreements here involved reading as follows:

“The provisions of this agreement shall be *effective on all voyages* shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made *applicable by special agreement or rider attached to shipping articles.*”

period of 1940 and 41, were governed by agreements and supplemental agreements entered into by the Pacific American Shipowners Association on behalf of the Employer, and the six Maritime Unions representing the seagoing personnel? A. They were.” (Ap. 156)

We respectfully submit the court has *wholly ignored* the last paragraph of the Rider reading as follows:

“It is further agreed that in the event of any increase in pay, overtime or war bonus or changes in insurance, which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners’ Association, the company will be *governed* by the *terms* and *effective date* of any agreement so reached.” (Emphasis ours.)

IV.

ERRORS IN THE COURT’S DECISION

(a) OCTOBER SUPPLEMENTARY AGREEMENTS ARE “IN EFFECT” FROM THEIR EFFECTIVE DATE, NOT MERELY FROM THEIR DATE

The court holds that the Supplementary Agreements of appellee with Marine Firemen of October 9, 1941, and the Supplementary Agreement of appellee with the Marine Cooks dated October 10, 1941, became effective *as of their date*, not as of the date which the agreements provide as their *effective date*. The opening paragraph of the Rider is as follows:

“The American Mail Lines agrees to *pay* an emergency *war bonus* to the crew of the S. S. Capillo, Voyage 6, in accordance with *provisions* contained in the applicable supplementary agreements *in effect* between the Pacific American Shipowners’ Association and the various Marine Unions.” (Ap. 31. Emphasis ours)

The court holds that these two contracts were “in effect” on October 11, 1941, the date when the Shipping Articles on the S. S. CAPILLO were signed, because

these two contracts were dated prior to that date. The Court says "The words 'in effect' do not mean 'hereafter to be made'."

We respectfully submit that the *date* of the Supplementary Agreements, in this instant case, is *utterly immaterial*. Whether the particular Supplementary Agreement is "in effect" depends, on the other hand, upon when the Supplementary Agreement makes the same "effective," if it contains a specific provision on the subject. *Here it does*. The two Supplementary Agreements here involved each provide as follows:

6. "The *provisions* of this agreement shall be *effective* on all voyages shipping articles for which were entered into *on or after* August 16, 1941, or upon any voyage to which the provisions herein are made applicable by special agreement *or rider attached to shipping articles*." (See Appendix B.)

The first paragraph of the Rider thus incorporated the "provisions" of "applicable" Supplementary Agreements "in effect." The "applicable" Supplementary Agreements are, of course, those dealing with *war bonuses* and other war compensation. Whether they are "in effect" on this vessel depends on the language, if any, of such applicable Supplementary Agreements on the subject of their *effective date*. In the absence of specific language on the subject the dates of the contracts would probably govern. Here, however, *all* six Supplementary Agreements contained *explicit* language as to their effective date. The construction urged by appellee has been the *practical* construction placed on the language of the Rider and

the Shipping Agreement since August, 1941, when the Rider was first adopted.

It will be recalled that the S. S. CAPILLO was the fourth vessel on which the Rider was used. These four vessels were the M. S. CROWN CITY, Articles signed August 13, 1941; S. S. COLDBROOK, Articles signed August 27, 1941; S. S. SATARTIA, Articles signed August 30, 1941 (Ap. 107). It will be observed these Articles were dated about *two months before* the October Supplementary Agreements were dated and *yet* as the October Supplementary Agreements all provided for their *retroactive* application to August 16, 1941, the crews of these three ships and, of course, the crew of the S. S. CAPILLO were paid off in accordance with increased bonus rates of the October Supplementary Agreements.

Mr. Lintner, a witness in this case, testified as follows:

“My understanding was at the time that a rider was just a temporary understanding which was to be interpreted and determined by the results of negotiations which were under way at the time. It was not unusual for us to put on riders on articles to cover situations that were under discussion, and in *every case* it was the *practical* application that the results and the agreements reached in connection with those riders were what the rider meant.” (Ap. 98-99)

The writer of this brief has corroborated these payments to the crews of the four vessels.

We emphasize the foregoing as it illustrates the purpose of the Rider which the court's opinion vir-

tually nullified. The court's opinion requires the Supplementary Agreement to have been dated before the date of the Shipping Articles to make such agreement *effective*. *The actual value of this Rider is to make effective, contracts negotiated long after their date*, if the particular Supplementary Agreement, as here, provides for a *retroactive effective date*.

The problem is a practical one and we earnestly ask the court to consider it as such. The custom of attaching Riders to Shipping Articles has been common throughout the industry. The practical reason for the construction urged by the petitioner is urged below. It is not only the *practical*, but the *real* reason.

Practical Causes Necessitating Such Riders

There were six Unions represented on board the S.S. CAPILLO on October 11, 1941. Negotiations between the employers and the Unions had been in almost constant progress. That is a situation which was true at the time and is often true. If a vessel remained in port until all negotiations with all six Unions had been completed and contracts signed, serious delays would obviously occur. The Unions, therefore, frequently resort to Riders like the one in question which assure the crew that they will receive the same benefits as if the ship had actually remained in port until all negotiations are completed.

While riders were not ordinarily *necessary* to make effective later agreements, here the Rider provided special compensation in the event a vessel was lost or seized through war risk. Such compensation had not

been covered before. The Rider was necessary here to insure such coverage if later Supplementary Agreements failed, as they had in the past, to do so. When the Supplementary Agreement carried full provisions for this subject they became effective.

The custom of incorporating by Rider the provisions of collective bargaining agreements *to be later made* is a relatively old one. *Jones v. United States* (D. C. Md. 1922) 284 Fed. 721; *The Howick Hall* (D. C. La. 1925) 10 F.(2d) 162. In each of these cases the Shipping Articles contained a clause purporting to make the wages set out in the Shipping Articles subject to *later change* in rates of pay. In both cases a reduction in the scale of wages shown on the Shipping Articles was subsequently made by the employer, the United States Shipping Board, by its *unilateral* action. It will be observed in the instant case that the first and last paragraphs of the Rider expressly require the *joint* action of the Unions representing the crew and Pacific American Shipowners' Association representing the employer. In respect to this last difference in the facts of the two cases cited and the instant case, the court in *The Howick Hall* case said:

“* * * I have no doubt that, had the officers of the seamen's unions and the shipowners' association *reached an agreement*, both sides would have been bound by it, and the clause could have been given effect; but to allow the shipowner or the captain to arbitrarily reduce wages would be going too far, and to give the clause that meaning would render it void for lack of mutuality.” (p. 163)

The opening paragraph of the Rider must be read

in the light of reality, the practical end to be attained and the subsequent interpretation of the parties. When agreements are finally concluded between the employers and the Unions, such agreements usually contain, as they did here, an "effective date" which in the *instant case* was August 16, 1941.

Present Decision of the Court Denies Members of Two Unions the Right To the Higher Bonus Rates of the October Supplementary Agreements.

We might also point out at this time that while *four* of the Supplementary Agreements were *dated* prior to October 11, 1941 (Ap. 114, 119, 259, 266), *two* were dated October 15, 1941, and October 16, 1941 (Ap. 265, 266). If the present interpretation of the court is right that the *dates of the Supplementary Agreements* are their *effective dates*, then the last two Supplementary Agreements would not furnish even the bonus rate for *all* the crew of the S. S. CAPILLO. The licensed engineers and radio operator covered by these last two contracts would receive a *lower* bonus rate than their shipmates although (1) these two contracts of October 15, 1941, and October 16, 1941, like the four other October Supplementary Agreements, explicitly provide that their *effective* date is retroactively fixed at August 16, 1941, and (2) the licensed engineers and radio operators on the three earlier ships having the identical Rider, received the higher bonus rates of the October Supplementary Agreements.

(b) ALL THE "PROVISIONS" OF THE OCTOBER SUPPLEMENTARY AGREEMENTS APPLY NOT MERELY TO THE BONUS RATE OF THE OCTOBER SUPPLEMENTARY AGREEMENTS.

Not only the bonus rate and the "effective" date but *all* the "provisions" of the October Supplementary Agreements are made applicable by *both* the first paragraph of the Rider and the language of the October Supplementary Agreements themselves. If there had been *no* Rider all the "provisions" of the October Supplementary Agreements by their own provisions would have been *applicable* and *effective* as *all* such agreements are made by their terms retroactively effective to August 16, 1941. If the first paragraph of the Rider drawn by the Unions is not clear as to the applicability of *all* the provisions and terms of the October Supplementary Agreements, then the language of such Supplementary Agreements themselves made subsequent to the Rider by the same Unions supplies any clarification that is needed by saying:

"The *provisions* of this agreement shall be effective on *all voyages* * * * after August 16, 1941 or upon any voyage to which the provisions herein are made *applicable by special* agreement or *rider* attached to shipping articles." (Emphasis ours)

This paragraph emphasizes that the Unions had in mind shipping articles such as those here involved which made "applicable" later supplementary agreements. To put it in reverse fashion, the October Supplementary Agreements expressly provided that their "provisions" were to be effective on the voyage here

under discussion. It could certainly not be argued that there is any language in the Rider making such "provisions" inapplicable. On the other hand, the first and last paragraphs of the Rider *reassert* or *reiterate* the applicability of the "provisions" and "terms" of the October Supplementary Agreements.

The decision of the court holds that the war bonus rate of \$80.00 per month provided in the October Supplementary Agreements dated October 9, 1941, and October 10, 1941, is the one applicable to appellants in the instant case, but declines to apply the accompanying "provisions" of the bonus rate. The court reasons that as the second paragraph of the Rider specifically provides for bonus to the crew during internment, it is controlling, because the October Supplementary Agreements do not specifically provide for payment of bonus to the crew while interned.

To hold as the court does that the accompanying "provisions" on war bonus in the October Supplementary Agreements are not "applicable" to this case because they contain *no* provision for payment of bonus during internment of the crew ashore is to ignore the fact that the Rider and the October Supplementary Agreements both have clauses which are clearly designed to cover the *complete field* of compensation to crews of vessels lost or interned through war risk. To illustrate the foregoing we place in parallel columns first the language of the Rider and then the language of the Supplementary Agreements:

PROVISIONS OF RIDER TO SHIPPING ARTICLES

"In the Event the Vessel and/or Crew Be Interned, Imprisoned, Hospitalized or Put Ashore Due to War Causes and for That Reason, Be Unable to Continue Their Voyage, the Company Agrees to Pay Wages and Bonus to the Date Members of the Crew Arrive in an United States Port, on the Pacific Coast: Furthermore the Company Agrees, in Such Event, to Arrange for Repatriation of Such Men to an United States Port, on the Pacific Coast. Also, That the Company Be Liable for Any Injuries Suffered by Any Crew Member Due to War Causes.

"The Company Agrees to Reimburse Each Man so Affected by the Amount of \$150.00 in the Event of Loss of Personal Effects by Any Member of the Crew Due to Necessity of Abandoning the Ship Resulting From Torpedoing, Mining, Bombing, Shelling, Scuttling or Any Other War Causes, Which Results in the Ship Wreck of the Vessel.

"The Company Also Agrees to Carry War Risk Insurance in the Amount of \$2,000.00 for each Member of the Crew, Against Loss of Life as a Result of War Perils" (An. 36).

CORRESPONDING PROVI- SIONS FROM OCTOBER SUPPLEMENTARY AGREEMENTS

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

"War risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement" (An. 123-124).

under discussion. It could certainly not be argued that there is any language in the Rider making such "provisions" inapplicable. On the other hand, the first and last paragraphs of the Rider *reassert* or *re-iterate* the applicability of the "provisions" and "terms" of the October Supplementary Agreements.

The decision of the court holds that the war bonus rate of \$80.00 per month provided in the October Supplementary Agreements dated October 9, 1941, and October 10, 1941, is the one applicable to appellants in the instant case, but declines to apply the accompanying "provisions" of the bonus rate. The court reasons that as the second paragraph of the Rider specifically provides for bonus to the crew during internment, it is controlling, because the October Supplementary Agreements do not specifically provide for payment of bonus to the crew while interned.

To hold as the court does that the accompanying "provisions" on war bonus in the October Supplementary Agreements are not "applicable" to this case because they contain *no* provision for payment of bonus during internment of the crew ashore is to ignore the fact that the Rider and the October Supplementary Agreements both have clauses which are clearly designed to cover the *complete field* of compensation to crews of vessels lost or interned through war risk. To illustrate the foregoing we place in parallel columns first the language of the Rider and then the language of the Supplementary Agreements:

PROVISIONS OF RIDER TO SHIPPING ARTICLES

"In the Event the Vessel and/or Crew Be Interned, Imprisoned, Hospitalized or Put Ashore Due to War Causes and for That Reason, Be Unable to Continue Their Voyage, the Company Agrees to Pay Wages and Bonus to the Date Members of the Crew Arrive in an United States Port, on the Pacific Coast: Furthermore the Company Agrees, in Such Event, to Arrange for Repatriation of Such Men to an United States Port, on the Pacific Coast. Also, That the Company Be Liable for Any Injuries Suffered by Any Crew Member Due to War Causes.

"The Company Agrees to Reimburse Each Man so Affected by the Amount of \$150.00 in the Event of Loss of Personal Effects by Any Member of the Crew Due to Necessity of Abandoning the Ship Resulting From Torpedoing, Mining, Bombing, Shelling, Scuttling or Any Other War Causes, Which Results in the Ship Wreck of the Vessel.

"The Company Also Agrees to Carry War Risk Insurance in the Amount of \$2,000.00 for each Member of the Crew, Against Loss of Life as a Result of War Perils" (An 36)

CORRESPONDING PROVI- SIONS FROM OCTOBER SUPPLEMENTARY AGREEMENTS

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

"War risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement." (An 123-124)

We cannot believe that this court realizes the result which will flow from the rule which the court has just laid down. Stating it bluntly, it means that a party to a collective bargaining agreement may claim the benefits of the agreement—the result of the *give and take* attendant upon collective bargaining—*without* at the same time being bound by the limitations placed thereon. This is a shocking result and cannot have been intended by the court. Bonus during internment ashore was *traded* in collective bargaining for higher bonus rates and wider bonus areas. The increased war bonus rate of \$80.00 per month of the October Supplementary Agreements and the increased areas in which same is to be paid is inextricably tied in with the other provisions and terms which together make up the final negotiated agreement. The “provisions” quoted above state in detail when this *new* \$80.00 bonus rate is to be paid in case of loss or seizure of the vessel due to war risk. These provisions form a part of the new \$80.00 bonus rate. For the court to seize the \$80.00 rate and wider bonus area of the October Supplementary Agreements and to ignore the other accompanying “provisions” is to refuse to follow the exact language of the Rider and paragraph 6 of the October Supplementary Agreements and to ignore the history of how this rate of bonus was adopted.

Rate of War Bonus and Limitations Thereon Are Parts of the Same Agreement

The record in the instant case shows that prior to August 16, 1941, Supplementary Agreements on the Pacific Coast contained *no reference to payment of war*

bonus to a crew after the loss or destruction of the vessel from war risk. (Ap. 132, 146-149). Under these circumstances upon the loss or internment of a vessel due to war risk all obligations of the owner to the crew summarily ceased. (Brief of Appellee, page 6).

In the conference called in New York, July-August, 1941, by the United States Maritime Commission and the United States Department of Labor to settle war risk compensation on a "national uniform" basis (Brief of Appellee, page 13), the Unions demanded increased rates of bonus, increased bonus areas, increased war risk insurance, and *further* demanded in the event of *loss or seizure* of the vessel through war risk, payment of wages, emergency increases, and *war bonus* until repatriation to the United States (during internment), compensation for lost effects and transportation to "port of signing on" (Ap. 209-211). Counterproposals were made by the operator offering substantial reductions in these demands. (Ap. 242-244). As a result of these negotiations a compromise was reached on August 16, 1941, in which substantial increases in rates of bonus, areas of bonus and war risk insurance were agreed upon and, *in addition*, for the *first* time, substantial compensation *after the loss or seizure of a vessel due to war risk* (but no bonus during internment). (Ap. 213-218). This agreement of August 16, 1941, was limited to licensed officers.

The following report on the contract of August 16, 1941, was distributed within a week after the making

of this contract and illustrates the final result of the negotiations:

“The new agreement which will apply *uniformly* on all Coasts, provides for a bonus of 60% of basic wages in lieu of the present 50% ; extends the war bonus area in the Pacific Ocean to the 180th Meridian instead of the 160th Meridian of East Longitude which formed the previous boundary, Voyages to Iceland or Greenland will be compensated for by a 60% bonus. Loss of personal belongings due to sinking of vessel, etc., will be compensated for up to \$500. The new agreement provides for continuance of basic wages and temporary emergency wages in case of internment, until arrival back in the *United States, but payment of bonus does not continue under such circumstances.*” (Ap. 223-226, Emphasis ours.)

Many demands of the Unions were met during the negotiations, but the demand for payment of *bonus during internment ashore and repatriation to “port of signing on”* were *not granted*. It was a *good trade* from the standpoint of the Unions. In the summer and fall of 1941 the war seemed remote and capture and internment of crews even more so. *Every seagoing member* of the Unions would benefit by higher bonus rates and more extended bonus areas. Loss of bonus during internment even in the unlikely event of capture and internment could only affect a small percentage of the membership of the Unions.

Subsequent negotiations on the Atlantic Coast with unlicensed personnel produced the same result (Ap. 231-236).

Subsequent negotiations on the Pacific Coast pro-

duced the same result for licensed and unlicensed personnel. (Brief of Appellee, pp. 22-25)

The same rule that bonus was not payable to a crew while interned ashore was followed after the war started by the Maritime War Emergency Board. (Brief of Appellee, pp. 30-31)

These facts leading up to the adoption of the Rider and the October Supplementary Agreements must be considered by the court as they formed the basis of the entire arrangement which the court is in this case called upon to interpret.

When the Rider was first presented in early August, 1941, by the Unions and first used by American Mail Line Ltd. on the articles of a vessel dated August 13, 1941, the Supplementary Agreements up to that time were entirely silent on the payment of war bonus *after* loss or capture of the vessel through war risk. The Rider therefore made elaborate provisions for same to protect the crew as the situation then existed. When new Supplementary Agreements were made, the first paragraph of the Rider contemplated that their "provisions" would be controlling where they were at variance with the Rider. The negotiations between the Unions and the operators have been emphasized to illustrate that the bonus rate and bonus area cannot be disassociated from the "provisions and terms" as to when such bonus rate should be paid. The rate and area were the result of long negotiations in which concessions were made on both sides.

We review the foregoing to show that bonus rate and bonus area cannot be disassociated from the accompanying "provisions" as to when it is to be paid.

(c) COURT HAS IGNORED LAST PARAGRAPH OF RIDER

The last paragraph of the Rider reads as follows:

“It is further agreed that in the event of any increase in pay, overtime or war bonus, or changes in insurance, which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners’ Association, the company will be governed by the *terms* and *effective date* of any agreement so reached.” (Emphasis ours)

If the court should determine, in the face of what we believe to be the overwhelming evidence to the contrary, that the first paragraph of the Rider did not make all the October Agreements controlling from August 16, 1941—their “*effective date*”—then the last paragraph of the Rider *certainly* does so.

The last paragraph of the Rider provides that in *future* agreements, if there is an “increase in pay, overtime or war bonus”, its “*terms*” and “*effective date*” apply. Here there was a substantial increase in both the *rate* of bonus and also the *area* in which it was to be paid. The crews of the three earlier vessels received this higher bonus in the wider area as provided in the October Supplementary Agreements by virtue of the identical Rider here involved and the terms of the identical October Supplementary Agreements here involved.

In this case the employer for the *first time* has invoked the accompanying “*terms*” of the October Supplementary Agreements as to when the increased bonus provided in these agreements should be paid. As sug-

gested above the court has construed the Rider as a "one way street". According to the ruling of the court only "provisions" and "terms" favorable to the crew are to be applied. "Provisions" and "terms" accompanying the higher bonus rate of the October Supplementary Agreements are to be *ignored* if they are unfavorable to the crew. This is manifestly neither fair, nor does it encourage confidence in collective bargaining agreements.

The October Supplementary Agreements provided a substantial *increase* in "pay, overtime or war bonus."

"1. The rate of bonus was increased from \$60.00 a month to \$80.00 a month, for unlicensed personnel, such as appellants, earning under \$120.00 a month (133, 116).

"2. For licensed officers and unlicensed personnel earning over \$120.00 a month bonus was raised from 50% of basic wages to 66 2/3% of basic wages (132, 116, 261, 265).

"3. The area in which bonus was payable in all cases was increased *from* the crossing of the 160th Meridian westbound to recrossing the same Meridian eastbound *to* the period from crossing the 180th Meridian westbound to recrossing the 180th Meridian eastbound (132, 116, 261).

"4. Port bonus was provided in the case of unlicensed personnel for ports subject to regular bombing (114, 117, 266).

"5. Payment for lost effects of unlicensed personnel was provided at \$150.00 and for licensed personnel at \$500.00 for the first time in the October Supplementary Agreements (114, 117, 259, 265, 266).

"6. War risk insurance increased for all persons from \$2,000.00 to \$5,000.00 (114, 117, 259, 265, 266).

"It will be also recalled that basic wages for the appellants had been raised \$10.00 a month by contracts negotiated in the late fall of 1941, and appellants were paid off at these new basic rates rather than those shown in the Articles (135, 269)." (Brief of Appellee,, pp. 34-35)

The first and last paragraphs of the Rider unequivocally emphasize the primary purpose thereof, which was to keep the rights of the crew of the S S. CAPILLO in line with current developments in collective bargaining.

Rider is unequivocal that "provisions" and "terms" of supplementary agreements shall apply—No saving of more favorable *existing* rights.

It has been suggested that the Unions drafting and presenting the Rider could not have intended to disturb by their Supplementary Agreements advantages or rights already protected by favorable explicit language in the Rider, i.e., such as the language on *bonus* during internment ashore. The answer is *evident* and conclusive.

When rights under existing contracts were to be preserved there has never been any difficulty in so doing and it is often done. In the instant case, for example, Decision of the National Defense Mediation Board, in case No. 80, provides in part as follows:

"Nothing in these recommendations shall be interpreted so as to reduce benefits now existing under collective bargaining contracts. Except as here-

in modified, existing contracts and arrangements shall continue.” (Ap. 231)

And again, in the Statement of Principles, adopted December 17-19, 1941, it was provided:

“* * * It is understood and agreed that * * * of all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated. * * * ” (Ap. 200)

It is a common practice in collective bargaining agreements to provide that a contract upon becoming effective should not lessen or diminish pre-existing rights. Such, however, was *not done* in the *instant* case. The exact *opposite* was done. Paragraph 6 of the October Supplementary Agreements *unequivocally* provided, “The provisions of this agreement shall be effective * * * .” There can be no question of the authority of the union to modify the Rider because the Rider by its own terms provides that war bonus is to be paid “in accordance with provisions contained in the applicable Supplementary Agreements in effect * * * .”

AMERICAN MAIL LINE LTD. NOT OWNER OF THE S.S. “CAPILLO”

While it has no bearing on the issues of the instant case we would like to call attention to the fact that the American Mail Line Ltd. was not the owner of the CAPILLO as stated in the opening paragraph of the court’s opinion. The owner of the vessel at all times has been the United States of America. The American Mail Line Ltd. was operating the vessel under bareboat charter.

CONCLUSION

We respectively submit:

1. The first paragraph of the Rider incorporates the "provisions" of the Supplementary Agreements whose effective date is prior to October 11, 1941. The mere *date* of the Supplementary Agreements is immaterial where an *effective* date is specifically given.

2. The first paragraph of the Rider and paragraph 6 of the October Supplementary Agreements plainly show that *all* of the provisions of the latter are *applicable*.

3. The October Supplementary Agreements were the result of *long negotiations* and their bonus rates are inextricably tied into the accompanying "provisions" of the October Supplementary Agreements as to *when* such bonus is to be paid. The rate of bonus, and the accompanying provisions as to when it is to be paid, form a full, integrated and uniform arrangement.

4. The language of the second, third and fourth paragraphs of the Rider are superseded by the corresponding provisions of the October Supplementary Agreements on the same subject which, on their face and by the history of negotiations, are a full, integrated and uniform arrangement covering *all* phases of the subject.

5. If the "provisions" of all October Supplementary Agreements are not incorporated by the *first* paragraph of the Rider, then their "terms and effective date" are incorporated by the *last* paragraph of the Rider as they *all* provide for substantial increases in "pay, over-time or war bonus".

We respectfully petition the court to reconsider and correct the errors in its opinion discussed above.

AMERICAN MAIL LINE LTD., Petitioner
By A. R. LINTNER, President

GROSSCUP, AMBLER & STEPHAN
JOHN AMBLER
Proctors for Petitioner

STATE OF WASHINGTON, County of King, ss.

A. R. LINTNER, being first duly sworn, on oath, deposes and says that he is President of AMERICAN MAIL LINE LTD., a corporation, the petitioner named in the foregoing Petition for Rehearing; that he executes this verification as the act and deed of said corporation for the uses and purposes therein stated, being duly authorized so to do; that he has read said Petition, knows the contents thereof and the same are true as he verily believes.

A. R. LINTNER

Subscribed and sworn to before me this 15th day of April, 1946.

INEZ M. ANNESLEY

Notary Public in and for the State
of Washington, residing at Seattle.

CERTIFICATE OF COUNSEL

As counsel for AMERICAN MAIL LINE LTD., petitioner in the above Petition for Rehearing, I hereby certify that in my judgment the petition is well founded and that it is not interposed for delay.

JOHN AMBLER

APPENDIX A
RIDER TO ARTICLES

The American Mail Line agrees to pay an emergency war bonus to the crew of the S.S. CAPILLO, voyage 6, in accordance with provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions.

In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific Coast: furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port, on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes.

The company agrees to reimburse each man so affected by the amount of \$150.00 in the event of loss of personal effects by any member of the crew due to necessity of abandoning the ship resulting from torpedoing, mining, bombing, shelling, scuttling or any other war causes, which results in the ship wreck of the vessel.

The company also agrees to carry war risk insurance in the amount of \$2,000.00 for each member of the crew, against loss of life as a result of war perils.

It is further agreed that in the event of any increase in pay, overtime or war bonus, or changes in

insurance, which may be granted, as the result of negotiations between the union and the Pacific American Shipowners' Association, the company will be governed by the terms and effective date of any agreement so reached.

GALE T. BLUNDELL

Deputy U. S. Shipping Commissioner

K. O. DREYER

Master

APPENDIX B.

UNLICENSED PERSONNEL

Supplementary Agreement of October 10, 1941 between Marine Cooks and Stewards' Association of the Pacific Coast and Pacific American Shipowners Association provides in part as follows:

"4. War Risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement.

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

* * * * *

"6. The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles." (App. 119, 123, 124)

The identical language is contained in supplementary agreement dated October 9, 1941 between Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association and Pacific American Shipowners Association (Ap. 114) and in the supplementary agreement dated October 9, 1941 between the Sailors' Union of the Pacific and Pacific American Shipowners Association. (App. 266)

LICENSED PERSONNEL AND STAFF OFFICERS

The supplementary agreement of October 10, 1941 between National Organization of Masters, Mates and Pilots of America and Pacific American Shipowners Association provides in part as follows:

“(3) In the event of loss of personal effects by any licensed officer, due to the necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, each licensed officer so affected shall be reimbursed by a sum not to exceed \$500;

“(4) In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port.

“While employees are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66 2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI.

“(5) War risk insurance of \$5,000 shall be furnished each Licensed Officer on voyages described in the above danger areas; such policy shall provide for the payment of the said sum of \$5,000 to the estate or designated beneficiary of such Licensed Officer in case of death due to war conditions or the payment of said sum to the Licensed Officer himself in the event of his total and permanent disability due to such war conditions, and shall provide for payment of any sum less than \$5,000 to which such Licensed Officer may be entitled for injury less than total or permanent disability resulting from said war conditions. Such policies shall be made available for inspection at the offices of the respective companies.” (Ap. 263-265)

The identical language is contained in the supplementary agreements between the Marine Engineers' Beneficial Association and the American Communications Association and Pacific American Shipowners Association (Ap. 265, 266).

The language of the court's opinion in the instant case suggests that the supplementary agreements of October 9, 1941, between appellee and the Marine Firemen and the supplementary agreement of October 10, 1941, between appellee and the Marine Cooks are not identical in respect to the language first above quoted.

In preparing the Apostles on Appeal at the request of the Proctor for appellants, to shorten the record only two supplementary agreements were printed in full, to-wit,

Supplementary Agreement of October 10, 1941, between appellee and Marine Cooks (Exhibit A-4, Ap. 119); and

Supplementary Agreement of October 10,
1941, between appellee and Masters, Mates
and Pilots (Exhibit A-4, Ap. 259).

In the case of the two agreements of October 9, 1941, (Exhibit A-4, A-8, Ap. 114, 266), between appellee and the Marine Firemen and the Sailors' Union only that part of the agreement which differed from the agreement with the Marine Cooks (Exhibit A-4, Ap. 119) was printed.

So also in the case of the licensed officers and staff officers, only that part of the supplementary agreements of October 15, 1941, and October 16, 1941, between the appellee and the Marine Engineers and between the appellee and the American Communications (radio operator) was printed which differed from the supplementary agreement with the Masters, Mates and Pilots (Exhibit A-6, Ap. 265; Exhibit A-7, Ap. 266).

The identical portion of these latter four supplementary agreements was not reproduced.

A statement to this effect is contained in the stipulation concerning the exhibits following the provisions for omitting certain portions of the various exhibits. The language of the stipulation is as follows:

“The omitted portions being a duplication of the corresponding portions of the contracts covering unlicensed and licensed personnel, respectively.”

(Ap. 73- 74.)

Brief of appellee, on pages 52 and 53, corrects a confusion created by statements contained in appellants' brief to the effect that the provisions of the October

Supplementary Agreements covering Marine Cooks, Marine Firemen and Sailors were not identical.

Counsel for appellant upon having the error in his brief called to his attention under date of October 20, 1945, immediately wrote to the Clerk of this court corroborating the statement above made that the supplementary agreements with the Marine Cooks and Marine Firemen were identical (Exhibits A-3 and A-4) in containing the language quoted above.

